11-260

Transcripts
&
Records
1876

272

Supreme Court U. States
4th Otto
260-307

SUPREME COURT OF THE UNITED STATES.

No. 506.

THE TOWN OF SOUTH OTTAWA, PLAINTIFF IN ERROR,

vs.

NOAH C. PERKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe for summons	2	1
Bond for costs	3	1
Summons	4	2
Declaration	7	3
Time to plead extended	19	7
Pleas	20	7
Demurrer to plea	28	10
Demurrer confessed and leave to amend plea	29	10
Leave to amend second plea and refile demurrer, &c	30	11
Affida.. of Pickens for defendant	30½	11
Demurrer sustained	31	12
Jury empanneled and judgment	31	12
Bill of exceptions	33	12
Supersedeas bond	55	19
Certificate to transcript	58	20
Writ of error	59	21

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Friday the twenty-ninth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } 11313. Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of December, A. D. eighteen hundred and seventy-three, came Noah C. Perkins, plaintiff, by Eldridge & Lewis, his attorneys, and filed in the office of the clerk of the circuit court of the United States for said northern district of Illinois, at
2 Chicago, in said district, his præcipe for a writ of summons against the town of South Ottawa, defendant; and also, at the same time, filed his bond for costs in said entitled cause. Which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States, northern dist. of Illinois, to the Dec. term, A. D. 1873.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt, $10,000. Da's, $10,000.

W. H. Bradley, clerk, &c., please file bond for costs & issue summons as above. Deft. in the township directly across the Ills. River, south of city of Ottawa.

Dated Dec. 3, 1873.

ELDRIDGE & LEWIS,
Plff.'s Attys., Ottawa, Ills.

(Endorsed:) Filed Dec. 4, 1873.

WM. H. BRADLEY, *Clk.*

3 *Bond for costs.*

Circuit court of the United States, northern district of Illinois, December term, A. D. 1873.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. }

I hereby enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

W. H. W. CUSHMAN.

Dated this 4th day of December, A. D. 1873.

(Endorsed:) Filed Dec. 4, 1873. Wm. H. Bradley, clk.

REC. 506—1

4 On the same day, to wit, the fourth day of December, A. D. 1873, a writ of summons issued out of said clerk's office against said defendant in said-entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the northern district of Illinois, greeting:

We command you to summon the town of South Ottawa, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December instant, to answer unto Noah C. Perkins in a plea of debt of ten thousand dollars, and for the detention of said debt to his damage as he alleges of ten thousand dollars, and have you then and there this writ.

5 Witness the Hon. Nathan Clifford, acting Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 4th day of December, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, Silas E. Kelsey my true and lawful deputy to execute the annexed writ, (Noah C. Perkins vs. Town of South Ottawa,) and to make true return of the execution thereof according to law.

[SEAL.] B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.

I have this 5th day of December, A. D. 1873, executed the annexed writ by reading the same to, and in the presence and hearing of,
6 James Pickens therein named, and delivering to and leaving with him a true copy thereof, the said James Pickens being supervisor of the town of South Ottawa.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois,
By S. E. KELSEY, *Special Deputy.*

Silas E. Kelsey, being first duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return.

Sworn to before me this 5th day of Dec., A. D. 1873.

DUNCAN McDOUGAL,
U. S. Commissioner.

(Endorsed:) Filed Dec. 12th, A. D. 1873. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of December, A. D. 1873, came said plaintiff by his attorneys, and filed in said clerk's office his declar-

ation in said-entitled cause; which said declaration is in the words and figures following, to wit:

7 *Declaration.*

Circuit court of the United States, northern district of Illinois, to the the December term, A. D. 1873.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Noah C. Perkins, who is a citizen of the State of Massachusetts plaintiff in this suit, by Eldridge & Lewis, his attorneys, complains o the town of South Ottawa, defendant in this suit, and a municipal corporation and body politic existing under the laws of the State of Illinois, in the county of La Salle, in the State of Illinois, and in the district aforesaid.

For that whereas the said defendant heretofore, to wit, on the first day of May, A. D. 1869, at South Ottawa, to wit, at the district aforesaid, made and executed its certain instrument in writing, and caused the same to be attested with the signature and private seal of D. F. Hitt, then and there supervisor of said town, and the signature and private seal of Thomas M. Mason, then and there the town clerk of said town, and bearing date on the day and year aforesaid, and

8 now to the court here shown, and then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and the said railroad company afterwards, to wit, on the day and year last aforesaid, to wit, at the city of New York, in the State of New York, for a valuable consideration to it in hand paid by said plaintiff, sold, transferred, and delivered the said instrument in writing to said plaintiff, of which said defendant, at the city of New York, to wit, at the district aforesaid, then had notice, a copy of which said instrument in writing is hereto annexed marked "A," and made a part of this count of this declaration, whereby and by means whereof the said defendant became liable to pay to said plaintiff the said sum of money in said instrument in writing, according to the tenor and effect and true intent and meaning thereof; and being so liable the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, agreed to pay the plaintiff the said

9 sum of money in said instrument in writing mentioned, according to the tenor and legal effect thereof; and although the time for the payment thereof long since elapsed, yet said defendant (although often requested, &c.,) hath hitherto wholly neglected and refused so to do.

2d. And also, for that, whereas the said defendant heretofore, to wit, on the first day of May, A. D. 1869, at South Ottawa, to wit, at the district aforesaid, made and executed its certain other instrument in writing, and caused the same to be attested with the signature and private seal of D. F. Hitt, then and there supervisor of said town, and the signature and private seal of Thomas M. Mason, then and there town clerk of said town, and bearing date on the day and year last aforesaid, and now to the court here shown, and then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company, and the said railroad company afterwards, to wit, on the day and year last mentioned, to wit, at the city of New York, in the State of New York,

10 for a valuable consideration to it in hand paid by said plaintiff sold, transferred, and delivered the said instrument in writing last mentioned to said plaintiff, of which said defendant at the city of

New York, to wit, at the district aforesaid, then and there had notice, a copy of which said instrument in writing is hereto annexed and made a part of this count of this declaration, & marked "B," and whereby and by means whereof the said defendant became liable to pay to said plaintiff the said sum of money, in said instrument of writing in this count mentioned, according to the tenor, and effect, and true intent and meaning thereof, and being so liable, said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, in consideration thereof, agreed to pay the plaintiff the said sum of money in said instrument in writing mentioned, according to the tenor and legal effect thereof, & although the time for the payment thereof long since elapsed, yet said defendant, although often requested, &c., hath wholly neglected and refused so to do.

11 3d. And also for that whereas the said defendant heretofore, to wit, on the first day of May, A. D. 1869, at South Ottawa, to wit, at the district aforesaid, made and executed to wit, twenty of its certain instruments in writing, commonly called railroad bonds, and numbered from one to twenty inclusive, a copy of one which said instruments in writing, so commonly called railroad bonds, is hereto annexed, marked "A," and made a part of this count of this declaration; and the said plaintiff avers that the remaining nineteen of said bonds were in substance the same in all respects, except as to the times when the same became due and payable, and the numbers thereof respectively. And the said plaintiff avers that the said defendant, at the same time and place, made and executed certain instruments in writing and promissory notes, commonly called interest warrants or interest coupons, for the payment of the enterest mentioned in said instruments in writing, as the same should annually become due, by the terms of said instruments in writing in this count first mentioned, and caused all the same to be subscribed by D. F. Hitt, then and there supervisor of said town, and

12 Thomas M. Mason, then and there town clerk of said town; and afterwards, to wit, on the same day and year last aforesaid, to wit, at the district aforesaid, delivered the said instruments in writing, commonly called railroad bonds, with the said instruments in writing, or promissory notes, so commonly called interest warrants or interest coupons, to the Ottawa, Oswego and Fox River Valley Railroad Company; and the said railroad company afterwards, to wit, on the day and year last aforesaid, to wit, at the city of New York, in the State of New York, for a valuable consideration to it in hand paid, sold, transferred, and delivered two of the said interest warrants, or interest coupons so called, to the said plaintiff, who thereby became and still is the lawful owner and holder thereof, which said two last-mentioned instruments in writing are now to the court here shown, and *of* which are respectively in words and figures following, to wit:

TOWN OF SOUTH OTTAWA.

$100.] *Interest Warrant.* [No. 18.

13 The town of South Ottawa, State of Illinois, will pay to bearer, on the first day of July, A. D. 1873, one hundred dollars, at the Fourth National Bank, in the city of New York, being one year's interest on the bond numbered above.

D. F. HITT, *Supervisor.*

THOS. M. MASON, *Town Clerk.*

TOWN OF SOUTH OTTAWA.

$100.] *Interest Warrant.* [No. 19.

The town of South Ottawa, State of Illinois, will pay to bearer, on the first day of July, A. D. 1873, one hundred dollars, at the Fourth National Bank, in the city of New York, being one year's interest on the bond numbered above.

D. F. HITT, *Supervisor.*

THOS. M. MASON, *Town Clerk.*

Whereby and by means whereof the said defendant became liable to pay to said plaintiff the said sums of money, mentioned respectively in said two last-mentioned instruments in writing, or promissory notes, respectively, so commonly called interest warrants or interest coupons, according to the tenor and legal effect thereof; and being so liable,
14 the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, in consideration thereof agreed with the said plaintiff to pay him the said sums of money, respectively, according to the tenor and legal effect of said instruments in writing last mentioned, respectively, and although the period therein mentioned for the payment thereof hath long since elapsed, yet said defendant, although often requested, &c., hath hitherto wholly neglected & refused so to do.

4. And for that the said defendant, at the district aforesaid, heretofore, to wit, on the first day of October, A. D. 1873, being justly indebted to the plaintiff in the sum of ten thousand dollars, for so much money before that time had and received by said defendant, to and for the use of said plaintiff;

And in the like sum for so much money before that time laid out and expended by said plaintiff to and for the use of the said defendant at its special instance and request;

And in the like sum for so much money loaned by said plaintiff to said defendant at its special request, in consideration thereof, then
15 and there agreed to pay to the said plaintiff the said several sums of money when it should be thereunto afterwards requested, yet though often requested the said defendant has never paid the same nor any part thereof. Whereby the plaintiff has suffered damage in the sum of ten thousand dollars, and therefore he brings this his suit.

ELDRIDGE & LEWIS,
Plff.'s Attys.

The defendant above named will take notice that the only causes of action relied on in this suit are the instruments in writing set forth in the 1st, 2d, & 3d counts of the foregoing declaration and the monies mentioned in said instruments in writing, respectively, all of which will be offered in evidence under the counts of said declaration.

ELDRIDGE & LEWIS,
Plff.'s Attys.

A.

No. 1.] UNITED STATES OF AMERICA. [$1,000.

STATE OF ILLINOIS.

Ten per cent. bond.

Town of South Ottawa.

The town of South Ottawa, in the county of La Salle, State of Illinois, acknowledges itself indebted in the sum of one thousand

16 dollars lawful money of the United States of America, which sum the said town of South Ottawa promi se to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said town is hereby irrevocably pledged. This bond is one of a series of twenty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to twenty, inclusive, and is issued in pursuance of an election or special town-meeting, held in said town on the eighth day of October, A. D. 1866, under and by virtue of a certain act of the legislature of the State of Illinois, approved February 18th, 1857, entitled "An act authorizing certain cities,
17 counties, incorporated towns, and townships to subscribe to the stock of certain railroads," the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company; at which election or special town-meeting a majority of the legal voters participating at the same voted "for subscription" to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, in the sum of $20,000, and to issue the bonds of said town therefor; and the said election or special town-meeting was by the proper authorities then and there declared duly carried "for subscription," previous application in writing of fifty legal voters of said town for such an election or special town-meeting, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of said town, and the said town clerk having called said election or special town-meeting in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

In witness whereof the supervisor and town clerk of said town have hereunto set their hands and seals this first day of May, A. D. 1869.

THOS. M. MASON,
Town Clerk. [SEAL.]

D. F. HITT,
Supervisor. [SEAL.]

(Written across face:) One thousand dollars.

18 B

No. 2.] UNITED STATES OF AMERICA. [$1,000.

STATE OF ILLINOIS.

Ten per cent. bond.

Town of South Ottawa.

The town of South Ottawa, in the county of La Salle, State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said town of South Ottawa promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank, upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and in-

terest in the manner aforesaid, the faith and revenue of said town is hereby irrevocably pledged. This bond is one of a series of twenty bonds bearing even date herewith, each for the sum of one thous-
19 and dollars, numbered from one to twenty, inclusive, and is issued in pursuance of an election or special town-meeting held in said town on the eighth day of October, A. D. 1866, under and by virtue of a certain act of the legislature of the State of Illinois, approved February 18th, 1857, entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election or special town-meeting a majority of the legal voters participating at the same voted "for subscription" to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, in the sum of $20,000, and to issue the bonds of said town therefor; and the said election or special town-meeting was by the proper authorities then and there declared duly carried "for subscription," previous application in writing of fifty legal voters of said town for such an election or special town-meeting, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of said town, and the said town clerk having called said election or special town-meeting in accordance therewith, and having given due notice of
19½ the time and place of holding the same as required by law and the act aforesaid.

In witness whereof the supervisor and town clerk of said town have hereunto set their hands and seals this first day of May, A. D. 1869.

D. F. HITT, *Supervisor.* [SEAL.]
THOS. M. MASON, *Town Clerk.* [SEAL.]

(Endorsed:) Filed Dec. 5th, 1873. Wm. H. Bradley, clk.

Afterwards, to wit, on the fifteenth day of December, in the December term A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. C. W. Blodgett, judge, appears the following entry, to wit:

Time extended to plead.

NOAH C. PERKINS
vs. } Debt.
TOWN OF SOUTH OTTAWA.

On motion of the defendant, by T. L. Dickey, esq., its attorney, the time to plead herein is extended two weeks.

20 Afterwards, to wit, on the thirteenth day of January, A. D. 1874, said defendant, by its attorney, filed in said clerk's office its pleas in said entitled cause, which said pleas, as finally amended, are in the words and figures following, to wit:

Pleas.

In the circuit court of the United States in & for the northern district of Illinois, to the December term thereof, A. D. 1873.

NOAH C. PERKINS, PLAINTIFF,
vs. } Assumpsit.
THE TOWN OF SOUTH OTTAWA, DEFENDANT.

1ST PLEA. And now comes the said defendant, by T. Lyle Dickey, attorney for said defendant, and says that said defendant did not prom

ise & undertake in manner & form as plaintiff has in that regard alleged in his said declaration, & of this said defendant puts itself upon the country, &c.

T. LYLE DICKEY, *P. D.*

21 2D PLEA. And for a further plea in this behalf, defendant says, actio non, because defendant says that the supposed causes of action in said declaration mentioned arise solely from the said supposed bonds & coupons in said declaration mentioned and are in no wise other or different; and defendant avers that said bonds & coupons are & were void, being executed by said town officers without lawful authority so to do, in this, that said supposed act of the legislature of the State of Illinois, (approved Feb. 18, 1857, entitled "An act authorising certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads,) mentioned in the recitals of said bonds, never did become and never was a law of the State of Illinois; in this, that said act of the legislature purports to have been enacted by the people of the State of Illinois, represented in the general assembly at the regular session thereof, convened on the fifth day of January, 1857, and that upon the journals of the proceedings of each house of said general assembly at said session (kept in pursuance of the thirteenth section
22 of the third article of the then constitution of said State) were made the following entries relating to a bill for said supposed act of said legislature, (and that no other or further entries relating to said act or to any bill for such act were ever made upon the said journals or upon either of them,) viz: upon the journal of the house of representatives of said general assembly, so kept for that session, it appears from the entries therein that on the 22d day of January, 1857, there was introduced "A bill for an act authorizing certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads," and that said bill was on that day read a first time in said house of representatives, and ordered by said house to a second reading, and that by order of said house the rule was dispensed with, & that said bill was on that day read a second time by its title in said house, and referred to the committee on internal improvements.

And that on the fourth day of February, 1857, said bill was reported back to said house of representatives from said committee without amendment, and with a recommendation that said bill should be
23 passed; and that on that day said bill was by said house of representatives ordered to a third reading. And that on the 14th day of February, 1857, said bill was taken up in said house of representatives, and then and there read a third time, and passed by said house of representatives; and on the said vote upon the final passage of said bill by said house the ayes and nays were taken and recorded in the journal, and that on said vote on said final passage of said bill the vote so taken was 54 ayes and no nays; and that afterwards, on the same day, it was ordered by said house of representatives that the title of said bill be as aforesaid, and that the clerk inform the senate thereof, and ask the concurrence of the senate therein.

And upon the journal of the senate of said general assembly, so kept for said session, it appears, from the entries of the proceedings of said senate in said journal, that on the fourteenth day of February, 1857, said bill, so passed as aforesaid by said house of representatives, was duly presented to said senate from said house of representatives,
24 and that said senate was, on behalf of said house of representatives, informed of the passage of said bill by said house of repre-

sentatives, and of the request of said house of representatives that said senate should concur with said house in the passage of said bill.

And that on the 16th day of February, 1857, said bill came up in said senate, and was read a first time in said senate, and ordered by said senate to a second reading, and that the rule was then and there suspended, and that said bill was on that day read a second time by its title in said senate, and referred by said senate to the committee on banks and corporations.

And upon the journal of the proceedings of said house of representatives so kept for said session it appears from the entries of the proceedings therein that on the 17th day of February, 1857, a message purporting to be from said senate (by Mr. Wyatt, assistant secretary thereof) was received by said house of representatives, which was as follows, viz:

"Mr. Speaker: I am directed to inform the house of representa-
25 tives that the senate have concurred with them in the passage of the following bills, viz: * * * * * A bill for 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," and upon the said journal of the proceedings of the said house of representatives it further appears, from the entries therein, that afterwards, on the said 17th of February, 1857, said bill was duly reported to said house of representatives (from the committee thereof on engrossed and enrolled bills) as correctly enrolled, and that afterwards, on the 18th day of February, 1857, a message was received by said house of representatives from the then governor of the said State of Illinois, informing them that said governor had approved and signed said bill.

And defendant further avers that no proceedings other than those above stated (as appearing from the entries upon said journals) were ever had or done by said general assembly, or by either house thereof, relating to said bill, or relating to any bill for the said supposed act of the legislature mentioned in said bonds; and that no
26 other proceeding of either said senate or said house of representatives relating to said bill, or relating to any bill, for said supposed act of the legislature were ever entered in the journal of said senate or in the journal of said house of representatives, and that no other bill for said supposed act of the legislature, or relating thereto, was ever introduced into either house of said general assembly, or acted upon either by said house of representatives or by said senate.

And that said bill for said supposed act of the legislature was not, in fact, read a third time in said senate on a day different from the day of the said first and second readings thereof in said senate; nor was the rule requiring that to be done ever dispensed with by said senate, as provided for in the then constitution of the State of Illinois. And that said bill was never read in said senate a third time by its title or otherwise. And that said bill was never put upon its final passage in said senate, nor was any vote upon the final passage of said bill taken
27 by ayes and nays in said senate nor was any such vote ever entered upon the journal of said senate, nor was there ever any vote taken in said senate relating to said bill upon the question "Shall the bill pass?" nor was Mr. Wyatt, assistant secretary of the senate, (or any other person,) authourized or directed by said senate to inform the house of representatives that the senate had concurred with them in the passage of said bill. And so defendant says that said supposed act of the legislature of the State of Illinois, approved February 18th, 1857, never became or was a law of the State of Illinois. And defendant further avers that said supervisor and town clerk of said town

had no authourity other than above stated to execute said bonds in behalf of said town, without this, that defendant promised and undertook in manner and form as plaintiff hath in his said declaration complained against the defendant; and this defendant is ready to verify, &c.

T. LYLE DICKEY,
Attorney for Defendant.

(Endorsed:) Filed Jany. 13, 1874. Wm. H. Bradley, clk.

28 Afterwards, to wit, on the fourth day of May, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office his demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit court of the United States for the northern district of Illinois. March term, A. D. 1874.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA.

And now comes the said plaintiff, by Eldridge & Lewis, his attorneys, and says that the said plea of the said defendant by it secondly above pleaded herein, and the matters and things therein contained, are insufficient in law to be answer 'unto, and therefore said plaintiff prays judgment, &c.

And the said plaintiff assigns the following special causes of demurrer:

1st. Said 2d plea amounts to the general issue.

2d. Said special plea should not conclude to the country.

29 3d. Said second plea, if a sufficient plea in bar, presents matters of record, which can only be tried by the court, or, if triable by a jury, said plea should conclude to the country.

ELDRIDGE & LEWIS,
Plffs. Attys.

(Endorsed:) Filed May 4, 1874. Wm. H. Bradley, clk.

Afterwards, to wit, on the next day, to wit, on the fifth day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof, before the Hon. Thomas Drummond, judge, appears the following entry in said entitled cause, to wit:

Demurrer confessed & leave to amend 2d plea.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt.

Now come the parties, by their attorneys, and the defendant, by its attorney, confesses the general and special demurrer of the plaintiff to the second plea of the defendant filed herein; and, on motion, leave is given the defendant to amend its said second plea, the same to be done in two weeks.

30 Afterwards, to wit, on the 19th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceed-

ings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Leave to amend plea, &c.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt.

Now come the parties, by their attorneys, and, on motion of the defendant, by its attorney, leave is given it to amend its second plea herein, by striking therefrom the words "conclusion to the country," and by inserting therein, in lieu thereof, the words "and this the defendant is ready to verify;" to which amended plea the plaintiff, by his attorney, by leave of the court, refiles his demurrer; and, the same now coming on to be heard, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

Afterwards, to wit, on the twentieth day of May, in the ad-
30½ journed May term, A. D. 1874, of said court, in the record of the proceeding thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Demurrer sustained.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt.

Now come again the parties by their attorneys, and, after hearing the concluding arguments of counsel upon the demurrer of the plaintiff to the amended plea herein, the court, being sufficiently advised in the premises, sustains said demurrer.

Afterwards, to wit, on the 29th day of May, A. D. 1874, said defendant, by its attorney, filed in said cause an affidavit in words and figures following, to wit:

Affidavit.

In the circuit court of the United States in & for the northern district of Illinois, to the October term, A. D. 1873.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt.

JAMES H. PICKENS, being first duly sworn, on oath deposes and says, that he is supervisor of the town of South Ottawa, in the county of
La Salle & State of Illinois, defendant in the above-entitled
31 suit. Affiant further says, upon information & belief and advice of counsel, that the alleged bonds upon which said above-named suit is brought, were never executed by said town by any one having lawful authority to execute the same in behalf of said town, & that said supposed bonds are not, nor is either of them, the deed of said town,

and that in that regard the pleas of the defendant, filed in the above entitled suit on the 13th day of January, A. D. 1874, are true in substance and in fact.

JAS. H. PICKENS.

Subscribed & sworn to before me May 29, 1874.

E. A. DRUMMOND,
U. S. Comr.

(Endorsed:) Filed May 29th, 1874. Wm. H. Bradley, clk.

Afterwards, to wit, on the 29th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of thereof, in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Jury empanneled & judgment.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA. } Debt.

Now come the parties by their attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit, F. Crow, W.
32 Campbell, S. Hyman, J. Bennett, A. H. Palmer, Charles Miller, C. Roberts, H. McClary, W. Haven, C. Sammends, J. M. Loomis, and C. Davis, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the issue for the plaintiff, and we find his debt in the sum of twenty-two hundred dollars, and assess his damages for the detention of said debt to the sum of three hundred and ninety-three dollars and six cents.

And thereupon the defendant, by its attorney, moves the court for a new trial herein. And the court being now fully advised upon said motion, overrules the same.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of twenty-two hundred dollars, his debt, and the said sum of three hundred and ninety-three dollars and six cents, his damages, making in all the sum of twenty-five hundred and ninety-three dollars and six cents for both debt and damages, together with his costs and charges in this behalf
33 expended, amounting to the sum of one hundred and thirty-one dollars and fifty-five cents.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States in and for the northern district of Illinois, at the May term, A. D. 1874.

NOAH C. PERKINS, PLAINTIFF,
vs.
THE TOWN OF SOUTH OTTAWA, DEFENDANT. } Action of debt.

Be it remembered that at the trial of the issues in this action before his honor Thomas Drummond and a jury, the plaintiff having read in

evidence to the jury two certain instruments, purporting to be bonds of the town of South Ottawa, of the genuineness and due execution of which no question was made, the first of which was in words and fig-
34 ures as set out in the declaration as Exhibit A. And the second of which instruments, so read in evidence by plaintiffs, was in the same words and figures as the first, in all respects save that the first supposed bond is numbered as number one, and the second supposed bond is numbered as No. two.

The defendant, to maintain the issues on the part of the defendant, produced before the court two volumes of printed books, one purporting to be the printed journal of the house of representatives of the twentieth general assembly of the State of Illinois, at their regular session begun and held January 5th, 1857, and the other volume purporting to be the printed journal of the senate of the twentieth general assembly of the State of Illinois, at their regular session begun and held at Springfield, January 5th, 1857.

And it was thereupon admitted in open court by the plaintiff that said volumes are the volumes printed in 1857, in pursuance of the statute in force at that time, by the authority and under the direction of the then secretary of state of the State of Illinois, as the
35 journal of said house of representatives for that session, and as the journal of said senate for that session; but plaintiff did not admit but denied that these printed journals are correct copies of the original journals, and thereupon defendant called the attention of the court to and read to the court in the presence and hearing of a witness, Andrew Linch, (who was called and sworn in behalf of defendant,) the following extracts from said journals respectively, viz: An extract from the proceedings of said house of representatives, (from said house journal on page 304,) had on the 27th day of January, 1857, as follows:

"Mr. Crothers introduced a bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads; which was read a first time and ordered to a second reading.

"On motion of Mr. Crothers, the rule was suspended, the bill read a second time by its title, and referred to the committee on internal improvements."

Also, an extract from the proceedings of said house, (on page 487,) had on the 4th day of February, 1857, as follows:

36 "Mr. Sparks, from the same committee, to which was referred house bill for 'An act to authorize certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads,' reported the same back without amendment, and recommended its passage.

"Ordered to a third reading."

Also, an extract from the proceedings of the said house (page 825) had on the 14th day of February, 1857, as follows:

"House bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads was taken up, read a third time, and the question being, Shall the bill pass? it was decided in the affirmative—yeas 54; nays 00. Those voting in the affirmative are—" (Here follows the names of 54 members.)

"Ordered, that the title be as aforesaid, and that the clerk inform the senate thereof, and ask their concurrence therein."

Also, the following extract (from page 949) from the proceedings of said house on the 17th day of February, 1857, appearing on the face of said printed journal among the first proceedings had at an afternoon

session of said house, held on that day, and begun at two o'clock
37 p. m. of that day, viz:

"A message from the senate by Mr. Wyatt, assistant secretary:

"Mr. SPEAKER: I am directed to inform the house of representatives that the senate have concurred with them in the passage of bills of the following titles, viz: 'A bill for an act authorising certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads.'" * * * * * *

Also, an extract from the said printed journal (on page 965) of the proceedings of said house on the same, 17th, day of February, 1857, as follows:

"Mr. Gondy, from the committee on engrossed and enrolled bills, reported as correctly enrolled bills of the following titles, viz: * * * 'An act authorising certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.'" * *

Also, an extract (from pages 983 & 984,) of proceedings of said house on the 18th day of February, 1857, as follows:

"A message from the governor, by Benjamin F. Johnson, private secretary:

"Mr. SPEAKER: I directed by the governor to inform the house
38 of representatives that he has approved and signed bills of the following titles, to wit: * * * 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.'" * * * * *

Also, an extract from said house printed journal (on page 1024) of proceedings had on the 19th day of February, A. D. 1857, as follows, viz:

"Seven o'clock a. m., the hour fixed for the adjournment of the two houses, having arrived, the speaker declared the house adjourned sine die."

Also, an extract from said printed journal of the senate (on page 629) of proceedings had in said senate on the 14th day of February, 1857, as follows:

"A message from the house of representatives by Mr. Boal, a member:

"Mr. PRESIDENT: I am directed to inform the senate that the house of representatives have passed bills of the following titles, viz: * *
"A bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads."

39 Also, another extract from the said printed senate journal (on page 712) of proceeding' of the senate had under date of the 16th day of February, and at an evening session of the senate on that day, which evening session began at 7 o'clock p. m. of that day, as follows, viz:

"House bill for an act authorizing certain cities, counties, and incorporated towns to subscribe to the stock of certain railroads coming up, was read a first time and ordered to a second reading.

"On motion of Mr. Fuller, the rule was suspended, the bill read a second time by its title, and referred to the committee on banks and corporations."

Also, another extract from said printed journal of the senate (on page 789) of proceedings of the senate had on the 19th day of February, 1857, as follows, viz:

"The hour for adjournment having arrived, the lieutenant-governor declared the senate adjourned sine die."

Said witness, ANDREW LINCH, being then examined, testified that he

had carefully read over said printed journal of the house of repre-
40 sentatives and said printed journal of the senate carefully, and that positively there is no entry in either of said journals, other than the extracts above stated, which has any relation to any action of either the house or the senate in reference to the passage of the said bill, or any other bill of the title in question, or relating to that subject; that he had read both of these printed journals all through, and, besides, he had read the journal in the secretary of state's office.

Defendant's attorney then offered to read in evidence to the jury the foregoing extracts from said printed journals, stating to the court that these printed journals are offered in connection with the testimony of the witness, Andrew Linch, for two purposes: for the purpose of showing all the proceedings which were had in both houses of the legislature in relation to the passage of the supposed statute entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," being the same supposed statute referred to in the recitals in these bonds, read in evidence by plaintiff,

& that he proposes to follow these extracts if admitted, by proof that
41 no proceedings other than those stated in these extracts are recorded in either of those printed journals relating to the supposed statute, and this for the purpse of showing that said bill for said act never passed the said senate, and that no vote was ever taken in said senate on the question, Shall the bill pass, or the ayes and noes taken and entered on such a vote, and consequently the supposed act never became a valid statute, and these printed journals are also offered for the purpose of showing notice to all the world that said bill for said act never did pass the senate, and therefore never was a valid statute. To which evidence, so offered to be given to the jury, the plaintiff objected, stating two grounds: 1st. That said printed statutes are not, as he insists, competent evidence to prove what proceedings were had by the legislature; and, second, that the plaintiff's rights as the holder of these bonds for value cannot be assailed by proving that said bill never passed the senate, and that plaintiff had a right to rely upon the printed published statute, and was not bound to look further.

Note by the court.

42 [It appeared that the bill which the defendant alleged had never become a law was duly signed by the speaker of the house of representatives and the president of the senate, and attested under the signature of each as having passed the respective houses, and was duly approved by the governor, and enrolled and was published as a law among the other laws of the State, under the official sanction of the secretary of state. And it appeared further that the legislature of the State had, by two acts approved by the governor, and the authenticity of which was not questioned, amended the act of the legislature referred to, viz: an amendment of March 27, 1869, and an amendment of April 20, 1869. Under these circumstances, the court was of opinion that the defendant could not, as against the plaintiff in this case, show that there was some omission in the journal of the senate, from whatsoever cause, to state that the act objected to passed the senate by yeas & nays, and therefore that the evidence sought to be introduced for the purpose stated was inadmissable. To which opinion of the court the

defendant then and there excepted. It may be proper also to
43 say that after the defendant had closed his evidence, the plaintiff offered to prove that the journals, extracts from which are stated

above, were not the original journals or copies from the original journals; but the court for the reason stated considered it unnecessary to make such proof.]

Defendant then produced to the court a certified transcript from the journals of the said twentieth general assembly, which certified transcript and certificate bore date December 6th, 1872, and was authenticated by the signature of Edward Rummell, then secretary of state, and also by the great seal of State, and was and is as follows:

UNITED STATES OF AMERICA,
State of Illinois, ss :

I, Edward Rummell, secretary of state of the State of Illinois, do hereby certify that I am the custodian of the original journals of proceedings of the senate and house of representatives of the twentieth general assembly of said State, at their regular session, begun and held at the city of Springfield, January 5th, A. D. 1857.

That said journals now remain in my office, and that upon ex-
44 amination of the same I find the following proceedings in relation to an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads, to wit:

In the house of representatives, on the 27th day of January, 1857, "Mr. Crothers introduced a bill for 'An act authorizing certain cities, incorporated towns, or townships to subscribe to the stock of certain railroads,' which was read a first time, and ordered to a second reading.

"On motion of Mr. Crothers, the rule was suspended, the bill read a second time by its title, and referred to the committee on internal improvements."

And afterwards, to wit, on the fourth day of February, 1857, in said house of representatives, the following proceedings appear and are entered upon the said house journal, to wit:

"Mr. Sparks, from the same committee, to which was referred house bill for 'An act to authorize certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads,' reported the same back without amendment, and recommended its
45 passage.

"Ordered to a third reading."

And afterwards, to wit, on the 14th day of February, 1857, the following proceedings of said house of representatives were had as appears from, and are entered upon, said house journal, to wit:

"House bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribed to the stock of certain railroads was taken up, read a third time, and the question being, Shall the bill pass? it was decided in the affirmative—yeas, 54; nays, 00.

"Those voting in the affirmative are—Messrs. Arnold, Bane, Blades, Boal, Burbank, Burke, Casey, Cristy, Church, Conelly, Crothers, Collam, Davis of Vermillion, Devine, Dougherty, Dyckes, Essler, Ervine, Eustace, Frisbie, Gilbert, Garrett, Goring, Gowdy, Gregory, Grimes, Hitt, Hurtt, Ingersoll, Jones, Kelsey, Kelley, Lathrop, Lawrence,
46 Little, Logan, Mason, Megredy, Morgan, Morris, Parker, Pinckney, Reading, Skallenberger, Sloan, Smith, Stepp, Trail, Tyler, Watt, Wheeler, Wilkins, Wycke, Mr. Speaker.

"Ordered, that the title be as aforesaid, and that the clerk inform the senate thereof, and ask their concurrence therein."

And afterwards, to wit, on the 14th day of February, 1859, the following proceedings were had in the senate of the said State of Illinois, and entered on the said senate journal, to wit:

"A message from the house of representatives, by Mr. Boal, a member:

"Mr. PRESIDENT: I am directed to inform the senate that the house of representatives has passed bills of the following titles, viz: * * * 'A bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads.'"

And afterwards, to wit, on the 16th day of February, A. D. 1857, the following proceedings were had in the said senate of Illinois,
47 and entered upon the journals of said senate, to wit:

"House bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads coming up, was read a first time and ordered to a second reading.

"On motion of Mr. Fuller, the rule was suspended, the bill read a second time by its title, and referred to the committee on banks and corporations."

And afterwards, to wit, on the 17th day of February, A. D. 1857, in the house of representatives of said State of Illinois, the following proceedings were had and entered in the journal of said house of representatives, to wit:

"Mr. Goudy, from the committee on engrossed and enrolled bills, reported as correctly enrolled bills of the following titles, viz: * * * 'An act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads.'"

And afterwards, to wit, on the 18th day of February, A. D. 1857, in said house of representatives the following proceedings were had and entered in the journal of said house of representatives, to wit:
48 "A message from the governor, by Benjamin F. Johnson, private secretary:

"Mr. SPEAKER: I am directed by the governor to inform the house of representatives that he has approved and signed bills of the following titles, to wit:" * * * * 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.' Which are all the entries of proceedings had in regard to said bill for said act entered upon said journals or either of them.

And I further certify that it does not appear from said senate journal that said bill for an "act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads" was read on three different days in said senate; nor does it appear from said senate journal that the rule requiring the same was suspended in said senate; nor does it appear from said senate journal that on final passage of said bill in said senate the ayes and noes were entered
49 in said senate journal; nor does it appear from either of said journals that a majority of all the members of both houses concurred in the passage of the said bill.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State.

Done at the city of Springfield this sixth day of December, in the year of our Lord eighteen hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

{ SEAL OF THE STATE OF ILLINOIS, AUG. 26, 1818. }

EDWARD RUMMELL,
Secretary of State.

And defendant's counsel then offered to read in evidence to the jury the said transcript from said legislative journals so authenticated, in connection with the aforesaid testimony of said witness, Andrew Linch, and in connection with the extracts aforesaid from said printed journals.

To the reading of which transcript so authenticated by the great seal of State and the signature of said secretary of state in evidence, the plaintiff by his counsel objected, and the court, for the reasons heretofore mentioned, sustained the said objection and refused to permit
50 the defendant to read the same in evidence.

To which ruling of the court, in refusing to permit said evidence so offered to go to the jury, the defendant excepted when said decision was made.

Defendant also during said trial called a witness, Evarts, who, after being duly sworn, was asked by defendant's attorney to state to the jury what representations, if any, he heard the officers (or any of them) of the Ottawa, Oswego & Fox River Valley Railroad Company make to the people of the town of South Ottawa shortly before the said election of the 8th of October, 1866, mentioned in the recitals in said supposed bonds sued upon in this action, tending to induce them to vote "for subscription" at said election.

To this question plaintiff, by his counsel, objected, and the court asked the counsel for the defendant to state what he proposed to prove; and thereupon defendant, by its counsel, stated to the court that it is proposed to prove in behalf of defendant that some of the officers of this railroad company, who procured the issue of these bonds, came into said township of South Ottawa after the notices for said election
51 (mentioned in said bonds) were published, and before said election was held, and represented to the voters of said township that said railroad company owned, had fully paid for, and had already in operation sixteen miles of their railroad at the south end thereof, being from Wenona to Streator; and that they had the means, with a little additional aid, to carry their road through and finish it to Geneva, on the Chicago and Northwestern Railroad; when, in point of fact, at that time, the said railroad company did not own said sixteen miles of railroad between Wenona and Streator, and had not paid for the same, but the same belonged to another railroad company.

Defendant further proposes to prove that said railroad company, by its officers, on the same occasion represented to said voters further that said company would construct its road and so operate it that it would compete as a rival with the Chicago, Burlington & Quincy Railroad, and be connected with the Illinois Central Railroad at Wenona at the south and with the Chicago & Northwestern Railroad at Geneva at the north,
52 so as to make a through line to Chicago from below, or the southwest, and by its competition with the said C., B. & Q. R. R. would reduce freight from said township to Chicago; and to follow this with proof that all said representations were false, and fraudulently made, & known to the said officers of said company, at the time they were made, to be false; and that the voters of said town who voted at said election "for subscription" relied upon and believed said representations to be true, and were thereby induced so to vote at said election, and that at that time said Ottawa, Oswego & Fox River Valley Railroad Company had made an arrangement to lease said railroad from Streator to Geneva to said Chicago, Burlington & Quincy Railroad Company as was thereafter done, and that before said railroad was completed the said Ottawa, Oswego & Fox River Valley Railroad Company leased its entire road to said C., B. & Q. R. R. Co. in perpetuity, and on such terms that said railroad does not and never can bring a single cent to said stockholders, and that said railroad has ever since
53 been held and operated by said C., B. & Q. R. R. Co., and that

by reason of the failure of said representations to be true the stock of said Ottawa, Oswego & Fox River Valley Railroad Company was rendered absolutely worthless, and the people of said town are in no-wise benefited by said road. If the said representations had been true said stock could have been of great value, at about par, and the people of said town would have been greatly benefited in their business.

The court asked whether defendant expected to prove notice of these alleged frauds to the plaintiff, and defendant's counsel stated that he did not propose to prove such notice to plaintiff. The court thereupon decided that said proposed proofs were not admissable against plaintiff, and refused to permit said question to be answered by said witness. To which ruling of the court, defendant by its counsel excepted at the time the same was made, and the court allowed said exception.

And the defendant then and there asked the court to sign and seal this, its bill of exceptions, and make the same a part of the record, which is done.

54 THOMAS DRUMMOND. [SEAL.]

(Endorsed:) May 29th, 1874.

WM. H. BRADLEY, *Clerk.*

55 Afterwards, to wit, on the 18th day of July, A. D. 1874, said defendant, by its attorney, filed in said clerk's office its bond in said-entitled cause, which said bond is in the words and figures following, to wit:

Supersedeas bond.

Supreme Court of the United States.

Circuit court of the United States for the northern district of Illinois.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA.

Know all men by these presents that we, the town of South Ottawa, in the county of La Salle and State of Illinois, as principal, and Daniel Mills, James E. Shaw, Benjamin M. Boyle, C. K. Lovejoy, P. C. Watts, & Fred Eells, as securities, are held and firmly bound unto Noah C. Perkins in the sum of five thousand dollars, to be paid to the
56 said Noah C. Perkins, his executors and administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated fourteenth day of July, A. D. 1874.

Whereas the above town of South Ottawa hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit courts of the United States for the northern district of Illinois:

Now, therefore, the condition of the above obligation is such that if the above-named town of South Ottawa shall prosecute its said writ of error to effect, & answer all costs and damages if it shall fail to make

good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

JAS. H. PICKENS, [SEAL.]
Supervisor, Town South Ottawa.
THE TOWN OF SOUTH OTTAWA,
By JAS. H. PICKENS, [SEAL.]
Supervisor.
DANIEL MILLS. [SEAL.]
J. E. SHAW. [SEAL.]
B. M. BOYLE. [SEAL.]
C. K. LOVEJOY. [SEAL.]
P. C. WATT. [SEAL.]
FRED EELLS. [SEAL.]

57 Supreme Court of the United States.

Circuit court of the United States for the northern district of Illinois.

NOAH C. PERKINS
vs.
THE TOWN OF SOUTH OTTAWA.

James H. Pickens, of the town of South Ottawa, in the county of La Salle and State of Illinois, being first duly sworn, says on oath that he is personally acquainted with Daniel Mills, J. E. Shaw, Benjamin M. Boyle, C. K. Lovejoy, P. C. Watts, and Fred Eells, of said town of South Ottawa, whose names are subscribed as securities to a supersedeas bond in the above-entitled cause, and that affiant is also acquainted with the pecuniary condition of said securities, and that each of said securities are worth at least five thousand dollars over and above all debts, liabilities, liens, incumbrances, and exemptions, as affiant verily believes.

JAS. H. PICKENS.

Subscribed & sworn to before me this 14th day of July, A. D. 1874.
[SEAL.] L. W. BREWER,
Notary Public.

58 Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed July 18th, 1874. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said-entitled cause, wherein said Noah C. Perkins is plaintiff and said town of South Ottawa is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in Chicago in said district, this eighteenth day of August, A. D. eighteen hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

59 UNITED STATES OF AMERICA, *ss:*

The United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Noah C. Perkins, plaintiff, and The Town of South Ottawa, defendant, a manifest error hath happened, to the great damage of the said
60 The Town of South Ottawa, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

[SEAL.]

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States,
for the Northern District of Illinois.

(Indorsed:) Circuit court of the United States for the northern district of Illinois. Noah C. Perkins vs. Town of South Ottowa. Writ of error.

(Indorsement on cover:) No. 506. The Town of South Ottawa, plaintiff in error, vs. Noah C. Perkins. N. Illinois, C. C. U. S. Filed 19th September, 1874.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

THE TOWN OF SOUTH OTTAWA,
Plaintiff in Error,
—vs.—
NOAH C. PERKINS,
Defendant in Error.

No. 254.

Error to the Northern District of Illinois.

Brief and Authorities

FOR PLAINTIFF IN ERROR.

—BY—

T. LYLE DICKEY.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

THE TOWN OF SOUTH OTTAWA,
Plaintiff in Error,
—vs.—
NOAH C. PERKINS,
Defendant in Error.

No. 254.

Error to the Northern District of Illinois.

Brief and Authorities

FOR PLAINTIFF IN ERROR.

—BY—

T. LYLE DICKEY.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

Statement of what the Record shows.

This was an action of assumpsit, by Perkins against the Town of South Ottawa, brought on two coupon bonds, purporting to be the bonds of that town, each for $1,000, payable to the Ottawa, Oswego and Fox River Valley Railroad Company, or bearer, on July 1st, 1872, with annual interest at ten per cent. from July 1st, 1869, payable on the coupons. The bonds bore date May 4th, 1869, and were signed by the Supervisors and Town Clerk of the town, and each of the bonds contained on its face a recital that:

"This bond is one of a series of 20 bonds, bearing even "date herewith, each for the sum of $1,000," * * * "and is issued in pursuance of an election held in said "town on *the 8th day of October*, 1866, under and by "virtue of a certain act of the Legislature of the State of "Illinois, approved Feb. 18, 1857, entitled, 'An act *author-*"'*izing* certain cities, counties, incorporated towns and "'townships to subscribe to the stock of certain railroads,'" * * * "at which election a majority of the legal voters "*participating in the same* voted 'for subscription' to the "capital stock of said railroad in the sum of twenty thou-"sand dollars, and to issue the bonds of said town therefor; "and the said election was by the proper authorities duly "declared carried 'for subscription,' previous application "having been made to the town clerk of the town, and "said clerk having called said election in accordance there-"with, and having given due notice of the time and place "of holding the same, as required by law and *the act* "*aforesaid*."

The declaration had special counts on the bonds, in

which the bonds were set out verbatim, and there was also a common count, for money lent, &c.

The town interposed a plea of *non-assumpsit*, supported by an affidavit denying the execution *by the town* of the bonds and coupons.

A plea of "*special traverse*" was also interposed to each of these special counts, alleging that the supposed act of February 18, 1857, never was or became a valid law of the State, in this: that no bill for said act, nor the act itself, was ever in any manner passed *by the Senate.* The plea sets out in detail all the proceedings of both houses in relation to the bill for said act, and says there were none other, and concludes with the special traverse or *absque hoc.*

To this plea Perkins demurred, and the court below sustained the demurrer. (Page 66).

Issue was joined upon the plea of *non-assumpsit*, and this issue was tried by a jury, and the verdict was for plaintiff; and judgment upon the verdict.

THE BILL OF EXCEPTIONS

shows that on the trial, after plaintiff had read the bonds in evidence, (the genuineness of the signatures being admitted), defendant offered to prove:

That at the supposed election on the 8th of October, 1866, the votes cast for subscription were less in number than one-half of the legal voters then residing in the town: and that, after the posting of notices and before the election, the railroad company, through its officers, willfully and knowingly made false and fraudulent representations to the voters who did vote for subscription; and that such representations (which are set out) were material, and were relied upon by such voters; and that such voters were thus fraudulently induced to vote "for subscription."

Defendant below also offered to prove, by the printed journals of each house of the Legislature, (for that session of the same), printed in pursuance of the constitution and laws, under the supervision of the Secretary of State; and also by the oral testimony of a witness (who had read said journals carefully and throughout) that there was no entry in the same of any passage by the Senate of said supposed act of February 18, 1857, mentioned in the recitals of said bonds, and also offered to prove the same fact by the production of a certified transcript from the record of the journals in the office of the Secretary of State, under the seal of the State.

Each part of this evidence, so offered, was excluded by the court, and to each ruling defendant below did then and there except, and his exceptions were allowed.

THE STATUTE UNDER WHICH THE BONDS WERE ISSUED.

The supposed statute, mentioned in the recitals in said bonds, is found on page 225 of Session Laws of Illinois of 1857. This supposed statute is entitled, "An act *authorizing* " certain cities, counties, incorporated towns and townships " to subscribe to the stock of certain railroads," and purports to provide, among other things, that any county or township near the route of the railroad, as then or thereafter located, may become subscribers to the stock of this road, and may issue coupon bonds for the amount of such stock so subscribed, * * * the proposition for said subscription having been first submitted as hereinafter provided, to the inhabitants of such county or township, and *approved by them*, and that on the application of 50 voters of such county or township, specifying the amount to be subscribed, it shall be the duty of such clerk to call an election, *in the same manner* that *other elections* for said county or township are called, for the purpose of deter-

which the bonds were set out verbatim, and there was also a common count, for money lent, &c.

The town interposed a plea of *non-assumpsit*, supported by an affidavit denying the execution *by the town* of the bonds and coupons.

A plea of "*special traverse*" was also interposed to each of these special counts, alleging that the supposed act of February 18, 1857, never was or became a valid law of the State, in this: that no bill for said act, nor the act itself, was ever in any manner passed *by the Senate.* The plea sets out in detail all the proceedings of both houses in relation to the bill for said act, and says there were none other, and concludes with the special traverse or *absque hoc.*

To this plea Perkins demurred, and the court below sustained the demurrer. (Page 66).

Issue was joined upon the plea of *non-assumpsit*, and this issue was tried by a jury, and the verdict was for plaintiff; and judgment upon the verdict.

THE BILL OF EXCEPTIONS

shows that on the trial, after plaintiff had read the bonds in evidence, (the genuineness of the signatures being admitted), defendant offered to prove:

That at the supposed election on the 8th of October, 1866, the votes cast for subscription were less in number than one-half of the legal voters then residing in the town: and that, after the posting of notices and before the election, the railroad company, through its officers, willfully and knowingly made false and fraudulent representations to the voters who did vote for subscription; and that such representations (which are set out) were material, and were relied upon by such voters; and that such voters were thus fraudulently induced to vote "for subscription."

Defendant below also offered to prove, by the printed journals of each house of the Legislature, (for that session of the same), printed in pursuance of the constitution and laws, under the supervision of the Secretary of State; and also by the oral testimony of a witness (who had read said journals carefully and throughout) that there was no entry in the same of any passage by the Senate of said supposed act of February 18, 1857, mentioned in the recitals of said bonds, and also offered to prove the same fact by the production of a certified transcript from the record of the journals in the office of the Secretary of State, under the seal of the State.

Each part of this evidence, so offered, was excluded by the court, and to each ruling defendant below did then and there except, and his exceptions were allowed.

THE STATUTE UNDER WHICH THE BONDS WERE ISSUED.

The supposed statute, mentioned in the recitals in said bonds, is found on page 225 of Session Laws of Illinois of 1857. This supposed statute is entitled, "An act *authorizing* " certain cities, counties, incorporated towns and townships " to subscribe to the stock of certain railroads," and purports to provide, among other things, that any county or township near the route of the railroad, as then or thereafter located, may become subscribers to the stock of this road, and may issue coupon bonds for the amount of such stock so subscribed, * * * the proposition for said subscription having been first submitted as hereinafter provided, to the inhabitants of such county or township, and *approved by them*, and that on the application of 50 voters of such county or township, specifying the amount to be subscribed, it shall be the duty of such clerk to call an election, *in the same manner* that *other elections* for said county or township are called, for the purpose of deter-

mining whether such county or township will subscribe to the stock of said road, and if a majority of said votes shall be "for subscription," then the board of supervisors of such county, or the supervisor and town clerk of such township so voting, shall cause such subscription to be made, and upon its acceptance by the railroad company, shall cause bonds to be issued in conformity with said vote, which bonds * * * shall not be of less denomination than $1,000.

(This supposed statute, as we insist, was and is void, never having been passed by the Senate.)

THE CONSTITUTION.

"Sec. 1, Art. 3. The legislative authority of the State "shall be vested in a General Assembly, which shall con- "sist of a senate and house of representatives."

"Sec. 3. Each house shall keep a journal of its pro- "ceedings, and *publish* them."

"Sec. 21. * * * On the *final passage* of *all bills*, "the *vote shall* be by ayes and noes, and *shall be entered* "on the journal; and *no bill* shall *become a law* without "the concurrence of a majority of all the *members elect* in "*each* house."

"Sec. 26. * * * An accurate statement of the re- "ceipts and expenditures of public money shall be attached "to and published *with the laws* at the rising of each ses- "sion," &c.

"Sec. 39. The General Assembly shall provide by "law that * * * the copying, printing, binding and "distributing the *laws* and *journals* * * * shall be "let, &c." (R. Statutes of Illinois, 1874, pages 41 to 45.)

"Sec. 21, Art. 4. Every bill which shall have passed "the senate and house of representatives shall, *before it*

" *becomes a law*, be presented to the governor ; if he ap-
" prove he shall sign it, but if not, he shall return it with
" his objections, to the house in which it originated ; and
" the said house shall enter the objections at large upon
" their journal, and proceed to reconsider it, * * *
" but in all such cases the votes of both houses shall be
" determined by yeas and nays, to be entered on the jour-
" nal of each house respectively." (R. S. 1874, 47.)

Extracts from and Statement of Decisions of the Supreme Court of Illinois.

The case of *Spangler* v. *Jacoby*, 14 Ill., 298, was decided at June Term, 1853. The bill for the supposed act under consideration in that case passed the senate, was amended in the house, was sent back to the senate for the concurrence by the senate in the amendment. The senate concurred in the amendment, and passed the bill as amended, but so far as appeared upon *the journal* of the house, the bill was *not passed* by the house, by a vote of *ayes and noes*. The court held the supposed statute void.

After quoting the 13th section, art. 3, of the constitution, the Court say :

" A majority of all the members elect in each house
" must concur on the final passage of a bill. Without it,
" the act has *no more force than* the paper on which it is
" written. The vote must be by ayes and noes. The
" *constitution* prescribes this *as a test* by which to deter-
" mine whether the requisite number of members vote in
" the affirmative. The vote must also be entered *on the*
" *journal*. * * * It must appear on the face of the
" journal that the bill passed by a constitutional majority.

" When an act has gone through all the forms of legis-
" lation, it is deposited in the office of the Secretary of
" State. The journals of the two houses take the same

Thomas v. *Dakin*, 22 Wendell.
Eld v. *Gorham*, 20 Cowan, 9.
Green v. *Wilber*, 22 Miss., 687.
McBride v. *State*, 4 Missouri, 303.
McCullock v. *State*, 11th Ind., 524.
Gunn v. *Green*, 1 Douglass, 351.

Even if it be thought that this construction of the constitution of 1848—by the Supreme Court of Illinois—was and is erroneous, still these decisions became a part of the constitution—as an amendment thereof—and affected the same, in the same manner, as if written in, or added to the constitution in 1853, when the first decision of this question was made. Whatever may have been the constitutional law of Illinois, prior to 1853, the rule of law adopted on that subject by the Supreme Court of the State became and was the law of Illinois in 1853, and was so until after these bonds were made, and they are subject to that fundamental law, in the same manner as as if it had been written out on their face—and *in such case* this Supreme Court of the United States has *always* followed and upheld the law, as ruled by the State Court. *Leffingwell* v. *Warren*, 2 Black., 599, and authorities there quoted, viz: 11 Wheaton, 351; 3 Peters, 270; 6 Peters, 291; 13 Pet., 45; 1 How., 767 and 812; 11 Howard, 297; 14 How., 504.

Nor is this rule qualified or invaded by the later decisions:

See *Walker* v. *Marks*, 17 Wall., 650.
Provident Institution v. *Mass.*, 6 Wallace. 630.
Randall v. *Bingham*, 7 Wall., 541.
Gut v. *State*, 9 Wall., 37.
Township of Pine v. *Talcott*, 19 Wall., 667.

In the last case given, this court says: "When the bonds "were issued, there had been no authoritative intimation,

" * * * that such statutes were invalid. * * The "National Constitution forbids States to pass laws impair- "ing the obligation of contracts. In cases properly "brought before us, *that end* can no more be unwar- "rantably accomplished, by *judicial decisions*, than by *leg- "islation*." Such decisions are placed on the same basis of authority as that on which *legislation* rests. Such decisions are the valid acts of the State, and unless forbidden by the Constitution of the United States, must be upheld. They enter into, form a part of, and validate or invalidate, as the case may be, every contract made in the State while they are in force.

This same doctrine is recognized and left intact in the cases of

Heymeyer v. *Iowa City*, 3 Wall., 294.
Guelpcke v. *Dubuque*, 1 Wall., 175.
Olcott v. *The Supervisors, etc.*, 16 Wall., 689 and 690.
Thompson v. *Lee Co.*, 3 Wall., 327.
Butts v. *Muscatine*, 8 Wall., 571.

And the subject is well discussed by Judge Dillon, in his excellent work on Municipal Corporations, 1st vol., sec. 416 and 416 *b*.

It is not necessary to adduce reasons or authority to this court to show that a county or township is not bound by such bonds, unless the officers making the bonds, in the name of the county, had authority by statute to so do in behalf of the county. That rule is too universal and too well settled; and must prevail, even against *bona fide* holders.

In this case the world had full notice. On the 4th of May, 1869, (when these bonds were issued,) *there* stood the constitution and the repeated decisions of the Supreme

Court of the State—declaring that no supposed statute (although signed by the Speakers of both Houses, and approved by the Governor, and printed in the session laws) was valid unless it appeared upon the journal of the Senate, that the same had been passed by the Senate, upon a vote upon ayes and noes, entered in that journal; there stood the constitution—declaring that the journal must be *published*, (Sec. 3, Art. 3); there stood the Senate journal (for the session of the Legislature at which the supposed statute professed to have passed), printed and published, in pursuance of law, under the direction of the Secretary of State—and in it was found no mention of the passage by the Senate of this statute; and there was the record of the journal in the office of the Secretary of State, kept in pursuance of law—and in it was found no mention of the passage of this supposed statute. All men had notice that this bill had not passed, and that the statute authority, mentioned on the face of the bonds, was a nullity.

II.

It is claimed, however, that the supposed statute of Feb. 18, 1857, though void for many years after it took its place on the statute book, was made valid on the 27th of March, 1869, by the passage of an act, found on page 329, Vol. 3, Private Laws 1869, entitled "An act to amend an "act, entitled 'An act to incorporate the Ottowa, Oswego "and Fox River Valley Railroad Company,'" as follows:

"Sec. 1. Be it enacted, etc., That the charter of the Ot-"tawa, Oswego and Fox River Valley Railroad Company "be, and the same is hereby, so amended as to authorize "said company to build its road, from the town of Wenona, "* * * to the city of Peoria."

"Sec. 2. That any city, county, town, or township,

" near to or through which said road is now located, is " hereby authorized to subscribe to the stock of said rail- " road, upon the terms and conditions prescribed in an act " entitled 'an act to authorize certain cities, counties, " 'towns and townships to subscribe to the stock of certain " 'railroads,' *in force* Feb. 18, 1857."

1st. We say that this statute of March 27, 1869, does not give any validity to the supposed statute mentioned in the bonds, because it is evident that the Legislature did not intend to *put in force* a former statute. The words of the statute do not profess to enact *into life* an old void statute, and no such legal effect can properly be given to this statute unless there be something clearly indicating an intention on the part of the Legislature to do so. If, in this statute of March 27, 1869, reference was had at all to the act recited in the bonds, it is evident the Legislatrue inadvertently supposed the act of February, 18, 1857, was in fact in force as a law, and upon that hypothesis, the evident intention and *only office* of the second section of the act of March 27, 1869, was to place certain towns not mentioned in the supposed act of February 18, 1857, on the same footing which certain towns named in the old act were supposed to occupy under the supposed old act. The old act being of no force, but void, the second section of the new act had no legal effect whatever. The Legislature simply did an act, under a misapprehension of the status of the law, which, by reason of that mistake, had no legal effect whatever.

2d. This act of March 27, 1869, does not validate the statute mentioned in the bonds as their foundation, because it does not refer to it at all, but refers to an act bearing a different title, and to an act which was *in force* February 18, 1857. We have shown that the supposed statute mentioned in the bonds *was not* "*in force*" February 18, 1857, because it was not passed by the Senate. The act referred

to in this statute of March 27, 1869, is described as one which *was* "*in force*" February 18, 1857. The title of the act mentioned in the bonds was "an act *authorizing* cer- "tain cities," &c. The title of the statute mentioned in the act of March 27, 1869, is "An act to *authorize* certain "cities," &c. The act in question, which we have proven to be void, is therefore not the act mentioned in the statute of March 27, 1869, and therefore is not affected thereby.

3d. Even should we concede that the act mentioned in the bonds is the same that is mentioned in the act of March 27, 1869, and that the effect was to validate the act which was, before that, utterly void, still it would only place the old act on the footing of coming into force on the 27th day of March, 1869, and that will not help the defendant in error; for, even on that hypothesis, the bonds are void, for the election upon which they profess to rest was void.

The election mentioned in the bonds as a foundation and authority for their execution, occurred October 8th, 1866, more than two and a half years before the statute of March 27, 1869. The election was of no legal effect when it was held, but was void. Void things are no things, and must be treated as though they never existed.

This act of March 27, 1869, cannot be construed as retrospective or as having a retro-active effect; for its terms do not warrant that construction, and the Legislature had no power to give it such retro-active force, so as to give validity to acts which, when done, had no validity whatever.

Blanchard v. *Sprague*, 3 Sumner, 535.
Calkins v. *Calkins*, 3 Barbour, 305, (S. C.)
Snyder v. *Snyder*, 3 Barb., (S. C.) 621.
Wood v. *Oakley*, 11 Paige Chan., 400.
Hackley v. *Sprague*, 10 Wend., 116.
Dash v. *Van Kleeck*, 7 Johns., 477.
1 Kent, 455, * Note A, 456.

Berley v. *Rampacher et al*, 5 Duer.
Plumb v. *Sawyer*, 21 Conn., 351.
Austin v. *Stevens*, 24 Maine, 520.
People v. *Supervisors, &c.*, 10 Wend., 365.
Jackson v. *Van Zandt*, 12 Johns., 169.
Van Rensalaer v. *Livingston*, 12 Wend., 490.
Webster v. *Cooper*, 14 Howard U. S., 504.
Proprietors, &c., v. *Laboree et al*, 1 Greel., 275.
Ely v. *Hoton*, 15 N. Y., 595.
Humphrey v. *Parsons*, 15 N. Y., 595.
Carroll v. *Lessees, &c.*, 16 Howard, 275.
Harvey v. *Tyler*, 2 Wallace, 328.
Ogden v. *Blackledge*, 2 Cranch, 272.

4th. The Legislature of 1869 had no power to impose, by statute, a debt upon the municipal corporation *in invitum;* and none but the people of the township, voting in some mode provided by statute, or the corporate authorities of the township, could give valid consent.

And the supervisor and town clerk of the township are *not* the corporate authorities of the township. Hence, even if it had been the declared intention of the act of March 27, 1869, to validate the old void act of February 18, 1857, and to validate proceedings had under the supposed authority of the void act, which proceedings took place before March 27, 1869, the Legislature had no such power.

By the Constitution of 1848, it was provided, Section 5, Article 9, as follows:

"The corporate authorities of counties, townships, * "* * may be vested with power to assess and collect "taxes for corporate purposes, such taxes to be uniform," &c.

This section has been construed by the Supreme Court

of Illinois to be, not a *grant* of power—but a *limitation* of power in the Legislature. It is held that the Legislature cannot impose upon a township by statute any liability for local purposes, without the consent of the town. It has also been ruled in substance that such consent cannot be lawfully given in behalf of the township, except by a vote of the people, in a mode authorized by law at the time of the election, or by the direct action of the "corporate authorities" of the municipality. Also, it has been decided that the supervisor and town clerk of a township are not the corporate authorities of a township, and cannot give such consent.

These principles are found in

Marshall v. *Silliman*, 61 Ill., 219.
Harwood v. *The St. Claire, &c.*, 51 Ill., 130.
Also, *People* v. *Mayor, &c.*, 51 Ill., 30.

In the case of *Marshall* v. *Silliman*, 61 Ill., 219, it was held that under the Constitution of 1848, the Legislature had no power to create a debt against a local municipal corporation for municipal purpose, and thus subject it to a tax for its payment *without its consent*. In that case, a void election had been held in August, 1868. A curative act was passed March 31, 1869—(Private Laws of 1869, Vol. 3, p. 372)—that this election of August, 1868 should be legalized and binding on the township in the same manner as if lawful when held. This act the court held unconstitutional. The court say, (61 Ill., 224): "It cannot be held "that the town has ever consented to this debt. The so-"called vote was an idle form. Persons opposed to the "subscription were under no obligations to vote against "it, because they had a right to regard the entire proceed-"ing as a nullity. The town, therefore, did not give its "consent."

That is, while the Legislature might, under our constitution, authorize the *town meeting* of a township, to con-

tract a debt for railroad purposes, involving the levy of taxes, *without* a special popular vote, (because the *town meetings* constitute the "corporate authorities" of the township, and, therefore, within the provision of Sec. 4, Art. 9 of the constitution); still the Legislature could not lawfully authorize the supervisor and town clerk of a township, to contract such a liability without a vote of the people, because those officers are not "the corporate authorities" of the township.

And such vote of the people, to have any valid effect, must be conducted according to some mode prescribed by law, in force *at the time* when the proceedings for election transpire.

Applying this doctrine, the Legislature might give authority to the town meeting of a township, to subscribe stock and issue bonds therefor, without a popular vote, and such subscription and bonds would be valid; but the Legislature could not give this power to the supervisor and town clerk of a township. The bonds, on their face, say they are issued by the supervisor and clerk, and not by order of the town meeting. Such an issue by the supervisor and clerk, under our constitution, must be supported, not only by a statute authority, but also by a vote of the people, taken in some way provided by statute. The Legislature having no power to dispense with a popular election in such case—cannot, if they would, by curative act, supply the constitutional requirement—by substituting a past void election, (or any proceeding essential to such election), for a valid, future one, whereat it was the lawful duty of the voter to attend. To do this would be to impose such liability by mere act of the Legislature, upon the township, without the consent of the township. The township can only consent by its corporate authorities, (the town meeting), or by a vote of the people taken in a manner prescribed by statute *at the time* of such election.

Defendant, in error, relies also upon a statute found on page 362 of Vol. 3, Private Laws of 1869, passed April 20, 1869, entitled, "An act to amend an act entitled 'an act au- "thorizing certain cities, &c., to subscribe to the stock of cer- "tain railroads,'" *in force February* 18, 1869, which, in section one, provides that, (in addition to the cities, counties, towns and townships, *authorized* by said act, to which this is an amendment, to subscribe to the stock of the Ott., Os. & F. River Valley Railroad), the following *portions* of cities, counties, townships, &c., be and are hereby authorized to subscribe to the capital stock of said railroad in manner as provided in said act, except as hereinafter provided.

Sections 2 and 3 provide for calling and holding elections, &c., requiring 30 days' notice, &c.

Section 4 is as follows: "All bonds issued under this "act, or to be hereafter issued under the act to which "this is an amendment, may be issued in sums of from "$100 to $1,000." (This act came in force April 20, 1869.)

This statute does not profess to *validate* the act which it professes to amend. No such effect can justly be given to it. It was plainly not the intention of the Legislature to produce any such effect. Neither the letter nor the spirit of the act indicate any such intention. The act, like that of March 27, 1869, was passed under a misapprehension by the Legislature. The first section was intended to place certain fractions of townships on the same basis with certain townships, under the old act, supposed to be in force, and does not, in any way, affect counties and townships described in the old void act of February 18, 1857. The second section was simply intended to remove a limitation supposed to exist in the old act. By the terms of that act, the bonds could not be of less denomination than $1,000. This second section was intended merely to reduce that limitation, so that no bonds should be issued of

a denomination of not less than $100. The section gives no new power, nor any power at all, to issue bonds, but provides that, "when issued," &c., they *may* be in sums from $100 to $1,000. The election mentioned in the recitals of the bonds in controversy, had transpired before this act was passed. The election was void when it occurred. It could not be validated by a curative act, so as to charge the municipal corporation with a debt or liability which it had not authorized, and neither this act nor the act of March 27, 1869, professes to be, or can be, construed to be curative acts.

Most that we have said of the act of March 27, 1869, is applicable to this act of April 20, 1869, and the Supreme Court of Illinois have decided that these acts of March 27, 1869, and April 20, 1869, do not validate the act of February 18, 1857.

Miller et al. v. *Goodwin et al.*, 7 Legal News, 294.

III.

Again, the bonds set out in the declaration, and produced at the trial, profess to set out on their face the authority upon which they were issued. They set out expressly that they depend upon the supposed act of February 18, 1857, for the authority on which to rest. Neither the railroad company, nor the present holders of these bonds, can be heard *now* to allege that these bonds were issued, *not* under, and by virtue of the act of February 18, 1857, as stated on the face of the bonds; but were issued under *that* act, and *an act to amend that act*, and also an act to amend the charter of said railroad company. On the face of the bond their bed is made, and on that, and on that alone, they must lie.

Suppose a man had three different powers of attorney,

as agent of one principal — and he in doing an act in behalf of his principal — expressly professes to exercise *only* the powers conferred by *one* of these powers of attorney, and that power of attorney is set out in full in the instrument he executes — and it turns out that the act done was not warranted by *that* power of attorney — shall it be said that the principal shall be bound by the act of the supposed agent? We say, no. The agent held three powers; he undertook to exercise one of the powers, and did not *attempt* to exercise either of the others. It cannot be said, it's true, he exceeded the power which he did profess to use, but he had another power which he *might* have exercised, if he chose, and that other power would, if exercised, validate the act, and hence the act is valid. Neither can it now be said, true, the act of February 18, 1857, (under which alone these officers acted in making these bonds, and professed to act), was void; but there were other powers under which these officers might have acted, and then the bonds would be valid — hence they are valid. The answer is, these officers never attempted or pretended to exercise any powers under the act of March 27, '69, or April 20, '69; and hence, no power in those acts (if any there be) was ever exercised by these officers, who, on May 4, 1869, had no knowledge of these statutes. The bonds were made under the old dead act of February 18, 1857, and by it must stand or fall.

IV.

The defense of the plaintiff in error in this case ought not to be regarded with an unfavorable eye by the court, as an inequitable defense.

All the facts alleged in the special plea, and all the facts which plaintiff in error offered to prove at the trial, and which were excluded by the court below, must in this

court be taken as true. It must also be remembered that the real parties represented here by the municipal corporation are the taxpayers of the same, who are to be charged with these bonds, if at all, against their will, and without any agency on their part. The court will therefore take notice that the railroad runs through a mere corner of the territory of this municipal corporation — in such situation, that to a majority of the taxpayers it can be of no possible use; and the court will remember, that at the election a majority of these tax-payers did not vote for the issue of these bonds (but merely a majority of those who took part in the election), and that at the time of the election the proceedings had no sanction of law, and no man was bound to take part in the same. The court will also remember that those voters, who did vote for subscription, were fraudulently cheated into that mode of voting.

The defendant in error may, in some sense, have equities, but they are no higher than the equities of these taxpayers. Defendant in error may be a holder of these bonds for value — but he is not a holder without notice, for the records, on their face, told him these bonds were void.

T. LYLE DICKEY,

For Plaintiff in Error.

Supreme Court, The United States.

TOWN OF OTTAWA
vs.
PERKINS. } No. 58.

BOARD SUPERVISORS
OF KENDALL COUNTY
vs.
AUGUSTUS T. POST. } No. 59.

Brief of P. PHILLIPS,

FOR PLAINTIFF IN ERROR.

R. O. Polkinhorn, Printer, 632 and 634 D Street, Washington, D. C.

Supreme Court, of the United States.

TOWN OF OTTAWA
vs.
PERKINS.
No. 58.

Brief of P. PHILLIPS,

FOR PLAINTIFF IN ERROR.

This is an action of assumpsit, brought in the Circuit Court, U. S., Northern District of Illinois, against the plaintiff in error, on certain coupons.

The bonds to which they were attached contain this recital:

"This bond is one of a series of twenty bonds, and is issued in pursuance of an election held in said town on 18 October, 1866, under and by virtue of a certain act of the Legislature, approved 15 February, 1857."

The defendant filed a *special plea* averring the invalidity of the act. To this there was a demurrer which was sustained by the court.

Under the *general issue* the defendant offered evidence of the facts impeaching the validity of the act. This evidence was ruled out by the court, and the defendant duly excepted.

Thereupon a verdict and judgment were rendered in favor of the plaintiff and the case is now here on a writ of error to that judgment.

Assignment of Error.

Plaintiff now assigns for error:

1st. The judgment sustaining the demurrer to the special plea. 2d. The rejection of the evidence offered by defendant to show the invalidity of the act of 1857, under the general issue.

The Act 15 February, 1857.

The Constitution of Illinois provides that "on the final passage of all bills the vote shall be by ayes and noes and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each House." Art. 3, sec. 21.

The special plea averred, that the journal of the Senate did not show that this act was passed in accordance with these requirements, and to the same effect was the evidence offered.

We are now dealing with a *constitution*, and not a statute, and courts would tread on dangerous ground should they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked *upon as essential to the thing to be done;* and they must then be regarded in the light of limitations upon the power to be exercised."

Cooley on Con. Lim. 78.

We are not to forget that we are trying the experiment of written constitutions whose limitations are intended to protect the people. Not to enforce these limitations is to abandon the experiment as a failure and to declare the omnipotence of the Legislature.

The question now before us was presented to the Supreme Court of the State in 1853 in Spangler v. Jacoby. It was then distinctly announced as the law of the State,

that to give validity to an act of the Legislature, the vote must be by ayes and noes, that this must be entered on the journal, *and must appear on the face of the journal.* 14 Ill. 298.

The doctrine of this case is cited by Mr. Cooley, as sound constitutional law. p. 141.

This decision was followed by several others to same effect extending from the year 1853 to 1864, all of which are cited in Mr. Dickey's Brief, at page 5.

To these I add another case in same court. People v. De Wolf, 62 Ill. 256, decided in the year 1871.

These decisions are in accord with those of other States, reference to which is made by Mr. Dickey.

These principles of constitutional construction, so long adhered to, were applied by the Supreme Court to the act now in controversy in the cases of Ryan v. Lynch and Miller v. Goodwin, decided at the June Term, 1873, and the November Term, 1875.

We have thus a uniform series of decisions of the highest court of the State upon the highest law of the State—that no act of legislation has any validity which is not evidenced by the formalities required by this constitutional provision.

To sustain the invalidity of the act, the defendant (as shown by the bill of exceptions at p. 34,) offered in evidence the printed journals of the House and Senate, admitted to have been published under the direction of the Secretary of State, in pursuance of statutory regulation.

He also offered in evidence (at p. 37) a certified transcript of the Secretary of State under the great seal, showing the proceedings of the two Houses on the passage of the bill, and proving that the ayes and noes were not entered on the journal of the Senate.

This evidence was excluded on the plaintiff's objection. The court holding that as the bill had been duly signed by the Speaker and President, approved by the

Governor, and published as a law, and as the Legislature had by the acts of 27 March, 1869, and 20 April, 1869, amended the act of 1857, the defendant could not, as against the plaintiff, show—"that there was some omission in the journal of the Senate from whatsoever cause, to state that the act objected to passed the Senate by ayes and nays." p. 37.

If the acts of 27 March and 20 April, 1869, can sustain the present action there is an end of this controversy. Their effect is elsewhere considered.

But independently of these acts, the rejection of the evidence was clearly erroneous.

If by constitutional requirement the validity of an act depends upon a vote by yeas and nays, duly appearing on the journal, then no concurrence of the Speaker, President, and Governor, and no publication can give validity to it when lacking this requirement.

The Constitution is as obligatory on officials as on private citizens.

By what character of evidence the invalidity should be shown was decided by the Supreme Court of the State in Ryan vs. Lynch, where the act was pronounced void, on evidence of a "transcript of the Senate journal certified by the Secretary of State in proper form."

This decision was affirmed in the subsequent case of Miller vs. Goodwyn, in which the court also holds as proper and sufficient evidence, for this purpose, the published journals of the two Houses. The reasons for which are fully set forth in the opinion.

In the case before us, the evidence offered and rejected was in both of these forms, and if this is insufficient, then no evidence whatever is admissible.

It follows necessarily that if the decisions of the State court, as to the unconstitutionality of the act of 1857, are obligatory on the Federal judiciary, then the bonds in

question were issued without authority, and cannot be enforced by any judicial proceeding.

The town of Ottawa had no power without legislative authority to issue such negotiable securities.

When such authortiy is conferred, it must be followed in all essential particulars or the securities will be void.

While mere irregularities, not going to the essentials of the power, would not prevent those who are in good faith, from enforcing them, yet as the doings of such corporations are matters of public record, and they have no general power to issue negotiable securities, any one who becomes a holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them.

Cooley Con. Lim, p. 215.
Dillon on Corporations, § 381.

We need not, however, look to commentaries for the law on this subject, for we have before us the adjudications of the court. In Marsh vs. Fulton, 10 Wall., 683, Mr. Justice Field delivering the unanimous opinion of the court, says:

"It is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not see how it could effect the liability of the county. This is not the case where the party executing the instrument possessed a general capacity to contract, and where the instrument might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed. It is a case where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an

innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under delegated authority."

This decision was made in 1870, and was followed by the case of Police Jury vs. Britton, decided in 1872.

Mr. Justice Bradley, in delivering the opinion of the court, says: "The power to issue such paper has been the means in several cases recently brought to our notice of imposing upon counties, and other local jurisdictions burdens of a fraudulent character, and of which they would have been summarily released had not the obligations been such as to protect them in the hands of *bona fide* holders. As such, we have been reluctantly compelled to sustain them, *but only on the ground, that the power to issue them had been expressly, or by necessary implication, conferred by the Legislature.*" 15 Wall., 566.

Again, the same question was presented in the case of The Mayor vs. Ray, 19 Wall., 477, in which Mr. Justice Bradley delivered the opinion. "If," says he, "the power to borrow money or issue bonds is needed, the Legislature can easily confer it. *Without such authority it cannot be exercised.* It is too dangerous a power to be exercised by municipal bodies indiscriminately."

"Where the power has not been given, parties must take such instruments at their peril."

They must take them subject to the risk that they have *been lawfully and properly issued.* The claims of *bona fide* holder will always be *subject to this qualification.*"

"We consider these principles to be so sacred and fundamental as to make it a matter of surprise that a different view should have been taken by some jurists of eminent ability. The cases on the subject are conflicting and irreconcilable."

This last decision would seem to be in exact accord with the doctrine announced in Marsh vs. Fulton, and the Police Jury vs. Britton. But we find that while all

the judges concurred in the judgments of those cases, Clifford, Swayne, and Strong, Justices, dissented on two grounds:

First. That the opinion restricts quite too much the powers of municipal corporations.

Second. Because its doctrines as applied to negotiable securities of a commercial character, are repugnant to the well-settled rules of law established by the repeated decisions of the court.

It is not our province to reconcile this dissent, with the assent of the same judges to the doctrine of the preceding cases.

It is sufficient for us to claim the protection offered by the opinion of the majority sustained, as it is by the decision in the previous cases.

We say, therefore, that as the act of 1857, under which these bonds were issued, has been declared to be unconstitutional by the decision of the State courts, there was no authority for the issue of the bonds, and they cannot be enforced against the town.

The Rule of Decision.

The question now presented is, are these decisions of the State court in the construction of their State constitution obligatory on the Federal tribunals?

The organizing act of 1789 provides, that, "the *laws* of the several States except where the Constitution, treaties, or statutes, of the United States, otherwise require or provide *shall be regarded as the rules of decision* on trials at common law, *in courts of the United States*, in cases where they apply."

This provision is now embodied in the 721st section, Revised Statutes.

That a *Constitution* is a law of the State and included within the meaning of the statute has been constantly recognized by the decisions of this court. A citation of cases is therefore unnecessary.

But what constitutes a law of the State?

It is a declaration of the legislative will, and when submitted to the highest court of the State, and is construed by it, this construction becomes a part of the statute itself—binding on all the subordinate courts of the State, and by virtue of the act of Congress, equally oblitory on the Federal judiciary.

In Leffingwell vs. Warren, decided in 1862, Mr. Justice Swayne cites the previous cases and announces as the settled doctrine of the court that, "the construction given to a statute of the State by the highest judicial tribunal of the State is regarded as a part of the statute, and is as binding upon the courts of the United State as the text."

"If the highest judicial tribunal of a State adopt new views as to the proper construction of a statute and reverse its former decision, this court will follow the latest settled adjudications." 2 Bl., 603.

See also Supervisors vs. U. S., 18 Wall., 81.
" Tioga R. R. vs. Blonburg, 20 Wall., 143.

If the Federal judiciary is bound by the *construction* of a statute given by the State court, it follows, necessarily, it must be bound by a decision which declares an act invalid as violative of the Constitution of the State.

The Constitution of the State is its highest law, and this can only be preserved by the exercise of the judicial power, in annulling all acts which invade its provisions.

This is now the received doctrine of all courts, and is equally applicable to acts of Congress and to State statutes.

In Mercer Cy. vs. Hacket, the suit was brought upon a bond of the city. The defense admitted that the act authorized the issue of the bond; but rested on the ground that the bond was not made in *pursuance of its terms*, and so was the decision of the State Court.

Mr. Justice Grier, in delivering the opinion of the court, while holding that this decision was not obligatory, said: "If the decision of that learned court was founded on the *construction of the Constitution or statute law of the State, we would have felt bound to follow it.*"

1 Wallace, 96.

In Gelpcke vs. Dubuque, the bonds were issued under certain acts which had been, by frequent adjudications of the State court, declared to be valid.

Subsequently, the court decided the act to be invalid.

The last decision was held not be obligatory on the Federal judiciary; for, say the court, if the contract was valid as the law stood when it was made, it could not be made invalid by a subsequent act, or by a subsequent decision of the court. (p. 206, 1 Wall.)

Evidently such a decision impaired the obligation of the contract; and contracts are protected from such wrong by the Federal Constitution.

Being thus protected, a writ of error, under the 25th section, would bring to this court for review the decision of the State court, and consequently this court would decide, independently of the State court, whether the obligation of the contract had been impaired.

Mr. Justice Miller dissented to this. He admitted that the *moral force* of the proposition as laid down by the majority was very great. He insisted, however, that the case did not fall within the revising power of this court, by reason that a contract had been impaired. "We are called upon (said he) not to construe a contract, not to determine how one shall be enforced, but to decide *whether there ever was a contract made in the case.* To assume there was a contract, which contract is about to be violated by the decisions of the State court, is to beg the very question in dispute."

Referring to the change of decision in the State court, he says: By this change of opinion the law is not

changed, but is to be considered as being always such as expounded by the later decision.

He deprecates the doctrine of the court in holding that the decision of the State court makes the law, "and that the same statute and Constitution means one thing in 1853, and another in 1859." For he adds, "it is impliedly conceded that if *these bonds had been issued since the more recent decisions of the State court, they would not hold them valid.*"

This dissent is forcibly sustained by argument and authority, but as the exigency of this case does not require it, we need not go further into the discussion thus raised.

The question was again presented in the case of Larned vs. Burlington, and the same doctrine was announced by Mr. Justice Clifford that the court would not follow the decisions of the State court "When the bonds *at the time they were issued* were valid by the Constitution and laws of the State as then expounded by the courts of the State. 4 Wall, 275.

So in Thompson vs. Lee County Mr. Justice Davis says:

"It is insisted that, under the constitution of the State, the Legislature could not confer the power to issue the bonds in controversy, and we so understand the highest court of the State now to decide.

"But, when the bonds were issued, the courts of that State held that there was no defect of constitutional power, and that the Legislature could lawfully authorize municipal corporations to subscribe to the capital stock of railroad companies.

"If the bonds in suit had been executed *since the decision in the State court we would be controlled by it.*" 3 Wall, 330.

We may then freely admit the soundness of the qualification of the general rule, that holds as obligatory on the

Federal Judiciary the decisions of the highest court of the State construing their own constitution or statutes, for in the case before us there is no decision prior to the issue of the bonds declaring the statute authorizing them to be valid.

On the contrary, there had been repeated decisions extending, as we have said, from 1853 to the date of these bonds, holding such acts to be void for precisely the same reasons as were applied in the judgments on the act of 1867. Instead of contrariety, we have in this case a consistent and harmonious course of decision.

The distinction between the rule and the exception is broad and well defined, and is, therefore, constantly recognized by the court.

In one of the latest cases it is said: "It is undoubtedly true, in general, that this Court does follow the decisions of the highest court of the States respecting local questions peculiar to themselves, *or respecting the construction of their own Constitution and laws.* But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or *adjudications upon the meaning of the Constitution or statutes of a State* which the Federal Courts adopt as rules for their own judgment."

Olcott vs. Supervisors. 16 Wall, 689.

It would, therefore, seem to be beyond dispute that the decisions of the State court declaring the act of 1857 to be void, as never having been enacted under constitutional requirement, is conclusive as a rule of decision.

In opposition to this, reliance is had on the decision of Township of Pine Grove vs. Talcott, 19 Wall, 667, in which the bonds in controversy were held valid notwithstanding the decisions of the State court declaring the act under which they were issued to be unconstitutional and void.

In delivering the opinion, Mr. Justice Swayne said: "Were we to yield in cases like this to the authority of the decisions of the courts of the respective States we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal Judiciary. The exercise of our appellate jurisdiction would be a solemn mockery.

Giving to these expressions the latitude contended for by the opposite side, they are utterly inconsistent with all the previous decisions on this subject.

Many of those who framed the Constitution and erected this "independent Federal Judiciary" assisted as Members of Congress in framing the act of 1789, which provides that the laws of the several States "*shall be* regarded as the rule of decision in the courts of the United States."

The absolute independence of the Federal tribunals was made to yield to the policy of harmony of decision between the Federal and State tribunals sitting in the same State.

The State tribunals are in nowise subjected to the revisory power of this Court, except when passing on a Federal question.

The decisions now in question declaring the nullity of the act of 1857 do not involve a Federal question.

If this case had been brought in a State Court, the judgment could not have been reviewed here under the 25 Section of the act of 1789.

In support of this decision, the judge refers to two cases in which it is said, this question was considered fully and are "conclusive of the case before us." R. R. Co. v. County of Oloe, 16 Wall., 667, and Olcot v. Supervisors, 16 Wall., 678. In both of these the opinions were delivered by Mr. Justice Strong.

In the former case the question was submitted to the court on a certificate of division from the Circuit Court of Nebraska, to wit, "whether the bonds issued under the act of 1869, in aid of a railroad outside of the State conflicted with the constitution of the State."

There had been no decision whatever by the State court, and consequently this case has no application to the subject now discussed.

The latter case, however, does present a decision of the State court, and on this:

Mr. Justice Strong after stating as already cited the obligation of this court, to follow the decisions of the State court when construing their constitutions or statutes, denies that the decision relied on is of that character—"very plainly (says he) such was not its effect. The question considered by the court was not one of interpretation or construction. *The meaning of no provision of the State constitution was considered or declared.*" What was considered, was the uses for which taxation generally, *taxation by* any *government* might be authorized, and particularly whether the construction and maintenance of a railroad is a matter of *public concern.*"

Again, he says: "Now whether a use is public or private, is not a question of *constitutional construction.* It is a question of *general law.* It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts."

"This consideration satisfies our minds that Whiting v. Fondulac County, furnishes no rule which should control our judgment."

We thus see, that the two citations made to sustain the doctrine announced in Pine Grove v. Talcot, wholly fail to sustain it. The first does not present the question at

all, and the second is in direct conflict with it, for it is distinctly announced by Mr. Justice Strong, that if the decision had been on the construction of the constitution of the State it would have been followed.

We may further remark in reference to this case that Miller and Davis, Justices, dissented, and the Chief Justice was absent.

From the forgoing we have the right to assume that the bonds cannot be sustained under the act of 1857.

That this was not a safe reliance is virtually confessed by the plaintiff below who seeks protection under the acts 27 March and 20 April, 1869, and these are referred to by the court, as one of the grounds for excluding the evidence to show the invalidity of the act of 1857. We are therefore now called on to examine the effect of these acts.

The Acts of 27 March and 20 April, 1869.

Let it be observed, in advance, that there is no recital in the bond calculated to mislead the holder, and the case does not therefore fall within the decisions as to false recitals; on its face the authority is distinctly announced on which it is issued. "This bond is one of a series of 20 bonds, &c., and is issued *in pursuance of an election held in said town on 8th October*, 1866, *under and by virtue of a certain act of the Legislature, approved February* 18, 1857."

There is no ambiguity here. The corporate authorities executed no other obligation than such as was authorized by the act of 1857 and the election of 1866. The holder of the bond, in accepting it, took it under the supposed authority of that act.

The bond was issued twelve years after the act and three years after the election.

It is now said that the issue of the bonds was authorized by these two acts, passed within a few weeks prior

to their execution, and that they were passed because of the admitted invalidity of the prior act of 1857.

On such assumption, how can we understand the recital in the bond of the void act and the omission of the valid authority?

It was not until the Supreme Court had, at the June Term, 1873, in Ryan vs. Lynch, held the act of 1857 to be absolutely void that the holders of these bonds set up the pretence they were sustainable under these acts.

Let us, then, examine the ground now taken.

The act of 1857 is entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads."

It authorizes them to become subscribers of the stock and to issue coupon bonds.

It contains these limitations: *First*, that the subscription should be approved by a vote of the inhabitants at an election to be held in the usual manner; and, *second*, that the bonds "shall not be of a *less denomination* than *one thousand dollars.*"

This act being invalid, the first reliance is on the act 27th March, 1869. (Private Laws, 3 vol., 329.)

This is entitled "An act to amend an act to incorporate the Ottawa, Oswego, and Fox River Valley Railroad Company."

The first section amends the charter so as to permit the company to make a new departure, and to "build a road from the town of Wenona, through the counties of Marshal, Woodford, and Farewell, to the city of Peoria, in the county of Peoria."

Having thus provided for a *new line of the road*, the 2d section provides "that any city, county, town, or township, *near to or through which* the said road is or may hereafter be located, is hereby authorized *to subscribe* to the capital stock of said road, upon *the terms and conditions prescribed in the act* 18*th February.*

It would seem to be very plain that the sole object of this act was merely to place the cities, counties, &c., "near to or through which" the new line was to run, on the same footing with those contiguous to other lines of roads. They were authorized to subscribe on the conditions prescribed by the act of 1857. That is, on first holding an *election*, and issuing bonds of a denomination *not less than* $1,000.

Not the remotest allusion is here made to Ottawa, its election, or its bonds. The act of 1857 is mentioned merely for the purpose of ascertaining the "conditions" on which the "cities, counties," &c., contiguous to the new line might subscribe. Such reference is not a re-enactment or a recognition of its validity. For the purpose of description it was wholly immaterial whether it was valid on invalid.

Again: reliance is had on the act of 20th April, 1869, found in the same volume of Private Laws, at p. 362. This was passed fourteen days before the date of the bond, (4th May,) and is entitled "An act to amend the act of 18th February, 1857."

The first section provides that in addition to the cities, &c., which under the act of 1857 were authorized to subscribe to the named road, "the following *portions* of cites, &c, are authorized to subscribe to said road *in manner provided in that act, except as hereinafter provided.*" This is followed with an enumeration of cities, &c. There is no allusion to the town of Ottawa, situate in the county of La Salle, but the east half of the town of Farmbridge, and the west half of the town of Grand Rapids, both situate in the county of La Salle, are included in the enumeration.

The second and third sections provide for the mode of obtaining the assent of the inhabitants by election and the verification thereof.

The fourth and concluding section is thus written: "All bonds issued under this act, or which may be hereafter issued under the act to which this is an amendment *may be issued in sums from one hundred dollars to one thousand dollars.*"

We thus see the amendments which were in the contemplation of the Legislature.

The act of 1857, allowed cities, towns, &c., to subscribe, this act gave the right to *parts* of certain cities, towns, &c.

The act of 1857 fixed $1,000 as the minimum of the subscription bonds.

This act changed the amount and allowed the bonds "hereafter issued" to be in sums of $100 to $1,000.

There is here nothing whatever indicative of any intent of the Legislature to deal with the town of Ottawa and the election held there in 1866 under the act of 1857.

The fundamental principle in the construction of statutes is the intent of the Legislature. Now if the Legislature was cognizant of the fact that the act of 1857 had not been constitutionally passed, and intended to give a new authority, they would have declared it in such terms as would leave no room for doubt.

The act of 1857—had not then been subjected to judicial scrutiny, and it is evident that its imperfection was unknown to the Legislature.

The whole argument on the other side rests on this, that as the two acts make mention of the act of 1857, we are to indulge in the implication that it was the intention of the Legislature to affirm all that had been done under it and ratify its provisions.

We submit that such an inference is unsupported by authority or right reason.

In the interpretation of statutes the rule is well settled that it is the essence of every law that it shall apply to

future cases, and such must be its construction unless the contrary clearly appears.

McEwen v. Den, 24 How. 244.

Harvey v. Tyler, 2 Wall 347.

We need not deny that the Legislature had the power to recognize the election of 1866, and confer authority to issue the bonds notwithstanding that election had been held under a void statute.

But we insist that the intent to exercise this power should clearly appear in the new law, either by express terms or necessary implication.

In Campbell vs. City Kenosha, the Legislature had by two acts of the 22d and 23d March, 1853, authorized the city to issue the bonds. The former act was valid, the latter invalid. The bonds recited they were issued under the latter act.

In 1857 another act was passed revising the charter of the city, in which a railroad commissioner was provided for, whose duty it was "to receive all taxes laid for the benefit of the Kenosha Railroad Company, and redeem all scrip *which has been issued* to said *Railroad Company.*"

As to this, the court said: "This is not, *in terms*, a curative act, but it has that effect by *clear implication.* It is not doubted the Legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the people was under the wrong law.

If, by a direct act, equally in any other way, if the in-

Legislature to ~~legative~~ *clearly appears.*

goes beyond that of the State Court,

'the bonds not merely voidable but absolutely void, and consequently no subsequent act could so far give vitality to them as to estop the tax-payers from denying their legality."

Miller vs. Goodwin, Supra.

We are, however, content to rest the case on the decision of this Court, and insist upon the reversal of the judgment, without it clearly appears the Legislature intended by the two new acts to legalize the subscription and authorize the issue of these bonds.

P. PHILLIPS,
For Plaintiff in Error.

future cases, and such must be its construction unless the contrary clearly appears.

McEwen v. Den, 24 How. 244.

Harvey v. Tyler, 2 Wall 347.

We need not deny that the Legislature had the power to recognize the election of 1866, and confer authority to issue the bonds notwithstanding that election had been held under a void statute.

But we insist that the intent to exercise this power should clearly appear in the new law, either by express terms or necessary implication.

In Campbell vs. City Kenosha, the Legislature had by two acts of the 22d and 23d March, 1853, authorized the city to issue the bonds. The former act was valid, the latter invalid. The bonds recited they were issued under the latter act.

In 1857 another act was passed revising the charter of the city, in which a railroad commissioner was provided for, whose duty it was "to receive all taxes laid for the benefit of the Kenosha Railroad Company, and redeem all scrip *which has been issued* to said *Railroad Company.*"

As to this, the court said: "This is not, *in terms*, a curative act, but it has that effect by *clear implication.* It is not doubted the Legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the people was under the wrong law.

If, by a direct act, equally in any other way, if the intention of the Legislature to ~~legative~~ *clearly appears.* 5 Wall., 203.

legalize

The decision goes beyond that of the State Court, which declares "the bonds not merely voidable but absolutely void, and consequently no subsequent act could so far give vitality to them as to estop the tax-payers from denying their legality."

Miller vs. Goodwin, Supra.

We are, however, content to rest the case on the decision of this Court, and insist upon the reversal of the judgment, without it clearly appears the Legislature intended by the two new acts to legalize the subscription and authorize the issue of these bonds.

P. PHILLIPS,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

BOARD SUPERVISORS OF KENDALL COUNTY *vs.* AUGUSTUS T. POST. } No. 59.

This is an action brought against plaintiff in error, in the Circuit Court, U. S. for Northern District of Illinois, to recover the amount of certain bonds issued by said County in favor of the Ottawa, Oswego and Fox River Valley Rail Road Company or bearer.

The bonds are dated the 4th May, 1869, and are each for the sum of $1,000 and recite. "This bond is one of a series of fifty bonds bearing even date, herewith numbered from one to fifty inclusive, and is issued in pursuance of an election held in said County on 30 March, 1869, under and by virtue of an act of the Legislature of the State of Illinois, approved February 18, 1857.

The Defendant filed a plea denying its liability on the bonds—and also a special plea averring the invalidity of the act of 1857, under which the bonds were issued.

The second and special plea was demurred to, and the demurrer sustained.

Issue being joined on the first plea the defendant offered evidence, as shown by bill of exceptions, to show that the act of 1857 was invalid under the constitution of the State. This evidence was rejected and defendant duly excepted.

There was a verdict and judgment for the plaintiff on issue joined and this judgment is now here on writ of error.

Assignment of Error.

Plaintiff now assigns for error:

1st. The judgment sustaining the demurrer to the special plea.

2d. The rejection of the evidence to show the invalidity of the act of 1857, as set out in the Bill of Exceptions.

There is but little difference in the facts between this and the preceding case of town of Ottawa v. Perkins.

In both the bonds are dated 4 May, 1869, and recite the same authority, to wit, the act of 1857.

In the former case the recital is of an election held in 1866. In this of an election held 30 March, 1869.

There is nothing in this difference that calls for a separate argument, and we refer the court to the Brief in the former case in which we rely for a reversal of the judgment in this.

P. PHILLIPS,
for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

TOWN OF SOUTH OTTAWA

VS.

NOAH C. PERKINS.

Brief and Points for Defendant in Error.

G. S. ELDREDGE,
Attorney for Defendant in Error.

Supreme Court of the United States.

THE TOWN OF SOUTH OTTAWA, *Plaintiff in Error*,

vs.

NOAH C. PERKINS, *Defendant in Error*.

Error to Circuit Court of the Northern District of Illinois.

BRIEF ON PART OF DEFENDANT IN ERROR.

THIS was an action of DEBT for the recovery of the amount of certain bonds and interest coupons issued by the Town of South Ottawa, to pay a stock subscription by the Town to the Ottawa, Oswego & Fox River Valley R. R. Co., which Company was incoporated by an Act of the General Assembly of Illinois, in force June 21, 1852. Laws of Ills. of 1852, p. . This act was amended March 27th, 1869. Laws of Illinois, 1869, Vol. p. 329,—both of which acts are declared to be public laws.

The second section of the last act recognizes the existence of the act of Feb'y. 18th, 1857, cited by plaintiff in error, and under which the bonds in question were issued. The act of Feb'y. 18th, 1857, was again recognized by the General As-

sembly of Illinois, and amended by an act in force April 20, 1869; also cited by counsel for plaintiff in error. Vol. 3, Laws of Ills., p. 362.

The bonds in controversy were issued May 1st, 1869.

I.

The legal presumption is, that the act in question was constitutionally passed, and the Town is estopped to deny its authority to issue the bonds in question, having, as it must be assumed, received its stock in the R. R. Co., in payment of which the bonds were issued, and still retaining the same.

The Town is liable to refund the money received upon the sale of its bonds, conceding that it had no authority to issue them, and so long as it retains the beneficial results of their sale it cannot be permitted to question the validity of the bonds.

Dillon on Municipal Cor., 2d Ed., § 50, and cases cited.
Dill v. *Wanham*, 7, Metcalf, 438.
Paul v. *City of Kenosha*, 22 Wis. 268.
City of Galena vs. *Corwith*, 48 Ills. 423.
Godfrey v. *R. W. Co.*, 16 L. & E., 596.
Supervisors v. *Hubbard*, 45 Ills. 139.
Pres. &c., of *Keithsburg*, v. *Prick*, 34 Ills. 406.
Town of Pine Groev v. *Talcott*, 19 Wall. 677.

NOTE. There is no such misdescription of the act of 1857 in the amendatory act of 1869 as will defeat the effect of the latter act.

Gould v. *Sterling*, 24 N. Y. 456.
Starine v. *Town of Genoa*, 23 N. Y. 438.
Allegheny City v. *McClenkin*, 14 Penn. State, 82.

Adams v. *The Memphis & Little Rock R. R. Co.*, 2 Cald. (Tenn.) 660.
Jamison v. *The People*, 16 Ill. 267.
People v. *Farnham*, 35 Ills. 567.
T. P. & W. R. R. Co. v. *Town of Genoa*, 43 Ill. 209.

III.

The defendants in error had a right to rely upon the published act supported by the enrolled bill, authenticated by the signatures of the Governor and presiding officers of both branches of the General Assembly.

Pease v. *Pick*, 18 Howd. 595.
Ill. C. R. R. Co. v. *Wrenn*, 43 Ill. 77.
Finley v. *Logan County*, 17 Ill. 153.
Grogan v. *San Francisco*, 18 Cal. 61.
The City of Atchison v. *Dutcher*, 3 Kan. 104.
Stuns v. *Franklin Co.*, 48. Mo. 167.
Mills v. *Gleason*, 11 Wis. 490.
Campbelt v. *Kenosha*, 5 Wall. 72.
The City v. *Lamson*, 9 Wall. 477.
Board Coms. v. *Bught*, 18 Ind. 316.
People v. *Mahony*, 14 Mich. 496.
Wyman v. *City of Macon*, 21 Geo. 275.
H. & St. Jo. R. R. v. *Marion Co.*, 36 Mo. 294.
St. Jo. Township v. *Rogus*, 16 Wall. 659.
Olcott v. *Supervisors*, 16 Wall. 668.
Cowgill v. *Long*, 15 Ill. 202.
St. Joseph Township v. *Rogus*, 16 Wall.
Cooley Con. Lim., 370 to 381 and notes.

IV.

The question as to the validity of the bonds, and what evidence is sufficient to establish the passage of the act of Feb. 18, 1857, this Court will determine for itself, and will not be bound by the decisions of the State Court.

Bates v. *Muscatine*, 8 Wall. 575.
Jeff. Bank v. *Skelly*, 1 Black, 436.
McCracken v. *Haywood*, 2 Howd. 608.
Town of Pine Grove v. *Talcott*, 19 Wall. 666.
Supervisors v. *Olcott*, 16 Wall. 668.
St. Jo. Township v. *Rogus*, 16 Wall. 659.

G. S. ELDREDGE,
For Defendant in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE TOWN OF SOUTH OTTOWA
vs.
NOAH C. PERKINS.

BRIEF OF G. S. ELDREDGE,

COUNSEL FOR DEFENDANT IN ERROR.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1876.

Supreme Court, The United States.

THE TOWN OF SOUTH OTTAWA,
Plaintiff in Error,
vs.
NOAH C. PERKINS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Error to the Circuit Court of the Northern District of Illinois.

This was an action of DEBT for the recovery of the amount claimed to be due upon bonds and interest coupons, purporting to have been issued by the Town of South Ottawa, (plaintiff in error) in payment for a stock subscription to the Ottawa, Oswego, and Fox River Valley Railroad Company.

This Railroad Company was incorporated by an act of the Legislature of Illinois, in force June 21, 1852, (Laws of Illinois, 1852, p.). The seventeenth section of this act declares it to be a public law. This act was amended March 27, 1869. Laws of Ill. 1869, vol. 3, p. 329. The first two sections of the act are set out on pp. 12 and 13 of the brief of plaintiff in error. The third and last section declare it to be a public law.

It will be observed that the second section of the act recognizes the existence of the act of February 18, 1857, recited in the bonds in question, and it is further recited in the bonds that the act of February 18, 1857, was passed,

"having special reference to the said Ottawa, Oswego, and Fox River Valley Railroad Company."

The act of February 18, 1857, was again expressly recognized by the Legislature of Illinois, by an act in force April 20, 1869, amendatory thereof (Private Laws of Ill., 1869, v. 3, p. 362) entitled "An act to amend an act entitled "an act authorizing certain cities, counties, towns, and townships, to subscribe to the stock of certain railroads," in force February 18, 1857. The first section of this amendatory act, authorizes certain portions of certain other townships, etc., to subscribe to the stock of said Railroad Company "in the manner as provided in said act, &c.," except as therein provided. Section 2 provides for the manner of voting in order to render the amendment effective and applicable to the communities authorized by it to vote upon the question. Section 4 provides: "All bonds *issued* under *this* act, and to be *hereafter issued under the act to which this is an amendment*, may be issued in sums from one hundred dollars to one thousand dollars."

Section 5 declares it to be a *public* act.

It will be further observed that it appears by the certificate of the Secretary of State that this amendatory act was vetoed by the Governor, but after having been by him returned to the General Assembly with his objections, was reconsidered, and passed both Houses by a constitutional majority.

The attention of the court is called to the fact that the bonds which were the foundation of this action were issued *May* 1, 1869, after the passage of the two last mentioned amendatory acts. The bonds recite that the town had voted a subscription to the capital stock of the Railroad Company at an election held pursuant to the act of *February* 18, 1857.

The presumption being (and as a matter of fact we do

not understand it to be questioned) that the town of South Ottawa, having issued its bonds to the amount of $20,000 to enable it to pay for and obtain a like amount of stock in the Railroad Company, still retains its stock, and while so retaining its stock, now sets up the supposed invalidity of the bonds, by reason of an alleged want of conformity by the legislature to the requirements of the Constitution in the passage of the act under which the bonds were assumed to be issued.

On the part of the defendant in error it is insisted (1) that the town is estopped to deny its power to issue the bonds so long as it has received the consideration therefor and retains its stock; (2) that *upon this record the legal presumption* is that the law was constitutionally passed, and that the production of the public laws of the State embracing the act in question which, as was shown upon the trial in this case in the court below, was duly signed by the President of the Senate and the Speaker of the House of Representatives, and attested by them as having duly passed the respective Houses of the General Assembly, and duly approved by the Governor, is conclusive upon the plaintiff in error in this action, and (3) that the subsequent amendments of the act of February 18, 1857, and the repeated recognition of it by the Legislative and the Executive Departments of the State, prior to the issue of the bonds in question are in effect curative of any supposed defects in the passage of the original act. (4) Furthermore, that the publication of the original act, among the public laws of the State, supported by the enrolled bill on file in the office of the Secretary of State, duly signed and attested, for the purposes of this case, imports *absolute verity*, and cannot be overthrown or impaired in a collateral proceeding by the production of the Journals of the Senate, which we insist are not strictly records.

I

The defense set up by the plaintiff in error, to a recovery upon the bonds and coupons in question, is a most unjust and inequitable one; and certainly nothing can be more shocking to a proper sense of justice than for a municipal corporation to proceed under the *forms* of law to subscribe to the stock of a railroad corporation, issue its obligations, put them upon the market, receive the money for them, pay for its stock, retain it, and in the most solemn manner proclaim to the world its legal authority to so act, its strict compliance with such legal authority, publicly pledge its *faith* and credit for the payment of such obligations, retain the money realized by the sale of its bonds, or the stock purchased with it, and then repudiate its obligations to pay the innocent *bona fide* holders of its bonds who have been induced to purchase them upon the strength of the affirmation given by the town as to their validity. To effect such a defeat of the payment of its just obligations would be only the consummation of a gross fraud.

Such acts, by any private person or corporation, could only be fitly characterized as in the last degree unconscionable. Should then the acts of a community of individuals, clothed with municipal rights and privileges, and empowered to issue negotiable instruments, be permitted in the exercise of assumed corporate power, to be exempted from the application of the same principles which would be applied in the case of private corporations or private persons under similar circumstances?

It is submitted that no sound distinction should be made between municipal and private corporations, and individuals under such circumstances in this regard, and that the town is estopped to deny its want of authority.

The right to a recovery of *the money* thus wrongfully obtained must be conceded.

Dillon on Municipal Corporations, 2d Ed., § 750.
"City Slip" Cases, decided by Sup. Court of California, cited in note 2, p, 856.
Dill vs. Wareham, 7 Metcalf, 438.
Paul vs. The City of Kenosha, 22 Wis., 268.

There being then certainly an existing equitable liability to repay the money received upon these bonds, it must be conceded that the town would have the right to enter into any legal obligations for their payment, and no express legislative authority is necessary to authorize a municipal corporation to discharge its just pecuniary obligations by funding them, or by issuing its bonds for the discharge of its indebtedness at a future day.

City of Galena vs. Corwith, 48 Ills., 423.

As was said in this case, by Mr. Justice Breese, "Every corporation or every natural person has the undeniable and inherent right to *pay its debts*—to fund them if that be deemed the best policy, and to issue the necessary evidences thereof. It will not be denied that municipal corporations have power to contract debts, and without limit, unless restricted by their charters. Having this power, it follows, they can provide for their payment, in *such* mode as they and the holders of indebtedness may agree upon." * * * "A city being in debt, which is evidenced by scrip or promissory notes, may surely change the form of the indebtedness to interest-bearing bonds, and this without any express authority in its charter. It is an inherent power and vital, without which such organizations could not live."

Upon such a state of the case it is submitted, that if a liability existed upon the part of the town to refund the money or return the stock received by it in consideration of its subscription, it will not be permitted to retain the consideration and set up the technical defence that it had not authority to issue its bonds in the form and

manner it assumed to do, for in such case the defence is merely technical, and destitute of merit.

If there existed a liability on the part of the town to refund money which it received upon the sale of its bonds issued without legal authority, and which it had expended and could not then conveniently repay, then an indebtedness existed, which, of course, it was the legal duty of the town, in some lawful manner to discharge; this it would have to do by taxation or by the issue of its obligations, payable at a future time.

It would have the undoubted right, with the concurrence of the holders of its outstanding bonds, without express authority, to receive them and issue other bonds in lieu thereof, in order *to discharge this liability*, but having received the money, and being justly liable for its repayment it is submitted that so long as it retains the money or the beneficial results of its expenditure, viz: its stock in the railroad company, it cannot be heard to say, that its bonds were issued without authority.

Godfrey vs. The R. W. Co., 16 L. & E., 549.
Supervisors of Mercer County vs. Hubbard, 45 Ill., 139.

In the case of the Supervisors v. Hubbard, an election was called by the County Court, and the question of subscribing for stock and issuing bonds in aid of a railroad was submitted, coupled with an unauthorized condition. The County Court again submitted the question, omitting the objectionable provision, but intermediate, the first and last submission, the county adopted the township organization system, making it necessary that the election should have been *submitted by the Board of Supervisors*. Mr. Chief Justice Breese says, (142) "It is shown by the record that the county received stock in the railroad company to the full amount of their subscription,

and have repeatedly voted upon the stock and paid the interest on the bonds, and it is not for them now to say that the county is not bound, &c."

In the case at bar it will be observed that the town, after the passage of the act of March 27, 1869, expressly recognizing and amending the act of February 18, 1857, and authorizing "*any* city, county, town or township near to or through which said road is now located, to subscribe * * * *upon the terms and conditions*" prescribed by the act of February 18, 1857, issued its bonds in pursuance of an election previously held, and in strict conformity to the original and amendatory acts.

It is true, as is said by the learned counsel for plaintiff in error, on p. 14 of his brief, there is a slight—very slight—error in the recital of the act of February 18, 1857, in the act of March 27, 1869, but there can be no doubt as to the act referred to in the amendatory act, and that it was so understood by the town of South Ottawa. It is affirmed upon the face of these bonds, that the act of Febauary 18, 1857 was passed, "having SPECIAL *reference to the said Ottawa, Oswego and Fox River Valley railroad company.*"

It is not believed that this point made by plaintiff in error in this regard can be seriously considered as impairing the effect of this amendatory act, but on the contrary, it simply confirms the patent fact that upon the issue of the bonds after the passage of the amendatory act, there was a full understanding by the town that the original act was in all respects valid, and the bonds in question were issued under the act of February 18, 1857, by virtue of the power conferred by section 4 of the act amendatory thereof, in force April 20, 1869, which provides that "all bonds issued under this or to be "hereafter issued under the act, to which this is an "amendment, may be issued in sums of from "$100 to

"$1,000, &c." (Gould v. Sterling, 23 N. Y., 456; and Starin v. the town of Genoa, 23 N. Y., 438.)

The issue of the bonds in question, after the passage of the amendatory act of 1869, falls within the principle upon which the bonds were sustained in the case of the supervisors of Mercer Co. vs. Hubbard, *supra*, and case of the President, &c. of Keithsburgh vs. Frick, 34 Ills., 405.

By the passage of these amendatory statutes, the legislature in the most pointed manner affirmed and recognized the validity of the act of 1857, and when these bonds were issued (after the passage of these amendatory acts), as was said by this court in the case of the town of Pine Grove vs. Talcott, 19 Wall., 677, "there had been no authoritative intimation from any quarter that such statute was void," and in the passage of these acts the legislature affirmed its validity in the most solemn manner.

The bonds and coupons in question, issued under the circumstances shown, fall directly within the equitable principle laid down by Sedgwick on Constitutional Law, and approved by this court, in the case last cited, viz: "that when it is a simple question of capacity or authority (on the part of the corporation) to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who *has had the benefit of the agreement cannot* be permitted in an action founded on it, to question its *validity*. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the fruits of which he retains."

This same principle was applied in the Supreme Court of Pennsylvania, in the case of Allegheny City vs. Mc Clurken, 14 Penn. State, 82. The court, in this case, say: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly author-

ized in the charter, * * * and if a series of contracts have been made openly and palpably with the knowledge of the corporators, the *public* have the right to *presume that they are within the scope of their authority* granted." * * * The object of all law is to promote justice and honest dealing, when it can be done without violating principle. I cannot perceive that any principle is violated by holding the corporation liable for the contracts of their accredited agents, even not expressly authorized, when those contracts for a series of years were entered into *publicly and in such manner as by necessary and irresistable implication to be* within the knowledge of the corporators. * * * But, when to these circumstances, we add, that these corporators themselves *received the value of these notes* and contracts in the erection of improvements, and still enjoy the value of them, the conclusion is irresistable that the corporation ought to pay them. * * * The debt by positive engagement, it is due *ex equo et bono*, in the forum of conscience and in the forum of law." * * * If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them; they adopt the act and are responsible to those who on the faith of such acquiescence and approbation, trusted their agents. I speak now upon the basis of contracts not prohibited by statute."

The case of Adams v. The Memphis and Little Rock Railroad Company, 2 Cold., (Tenn.,) 660, was an action brought to collect certain bonds issued by the Railroad Company, under an ordinance of the city, secured by a mortgage executed by the city upon certain property belonging to the city, and for the payment of which the revenues of the city were pledged. These bonds passed into the hands of *bonafide* holders: The court say, "superadded to this, the regularity of these proceedings and

their binding effect upon the city were recognizd by two or more successive administrations of the city government, now can the city take advantage of its direct *want of authority* in the charter? * * * We think not. They must be bound by their own acts."

In Jamison v. The People, 16 Ill., 257, an information was filed against the trustees of the town of Oquaka, alleging that they were unlawfully exercising the powers and franchises of a corporation. The object of the proceeding seems to have been to procure an adjudication which would invalidate certain bonds issued by the trustees to certain railroads. It was alleged that the town had not become legally incorporated under the law. The respondent pleaded, among other things, their corporate acts and the public recognition of their corporate power; and that the legislature had twice recognized their corporate existence—first by an act authorizing the corporation to subscribe to the capital stock of certain corporations, approved June 21, 1852, and subsequently by another act approved February 8, 1855.

The court, per Skinner J., say (p. 258):

"The acts of the legislature referred to are public acts, and authorize the president and trustees of the town of Oquaka, as a corporation, to subscribe stock in a certain railroad company, and also to subscribe stock in a certain plank road company, * * to issue and negotiate bonds of the corporation, to provide for paying interest, &c.

"These acts, *recognizing* the existence of the corporation, and empowering it to act as a body corporate *in issuing and negotiating obligations of the town, and upon the faith of which individuals may have invested their money, preclude inquiry into the question of the original legal organization of the town*, and are *conclusive* upon the question as to the existence of the corporation. * * * Were we to

hold, after this acquiesence of the public and after their *recognition* by the *legislature*, that the town remains unincorporated, * * * what confidence could individuals have in the validity of securities emanating from these local authorities," &c.

Although this was a *direct* proceeding to procure an adjudication which should hold the respondents to have been wrongfully exercising corporate powers, yet in view of the subsequent recognition of their corporate existence by the Legislature, and upon the faith of which innocent parties had been led to purchase negotiable securities issued by the trustees, in the assumed exercise of their corporate powers, based upon such *Legislative recognition* of their corporate existence, the court was constrained to hold, in accordance with the views so often announced by this court, that justice to the holders of these securities precluded all enquiries into the legality of the original incorporation of the town.

And, again, in People vs. Farnham, 35 Ills., 567, the same principle was enunciated, and the decision in Jamison vs. The People, explicitly approved. See, also, Tolledo, Peoria, and Warsaw R. R. Co. vs The President, &c., of the town of Genoa, 43 Ill., 209.

The case of Campbell v. Kenosha, *supra*, is noticed by counsel for plaintiff in error. (See p. 18 of Mr. Phillips' brief.) In addition to the matter quoted by counsel, Mr. Justice Davis says, (p. 204,) "It is conceded that the Legislature had the right to authorize the city of Kenosha to take stock in a railroad, and issue bonds and provide for their redemption.

It did authorize these things to be done if the PEOPLE approved them, but as *their sanction was obtained in the wrong way*, thereby involving the legality of the proceedings, good faith and sound policy required at the hands of the Legislature, a full recognition of the legality of

the subscription." * * * "This was done by the provisions of the reissued charter of 1857."

After this the city council at different times and in various ways, recognized the validity of the obligations in question.

The case of Kenosha vs. Lamson, *supra*, is another illustration of the just and proper application of the principle which we insist should be applied to the bonds in question.

The constitution of Wisconsin provided that the Legislature, when providing for the organization of cities, etc., should *restrict* their power to borrow money. An act was passed consolidating the several acts relating to the city, but conferred upon the city *unlimited* power to borrow money and issue bonds. The city had previously issued its bonds to the railroad company. A subsequent act authorized the city to issue other bonds and take up those previously issued for the purpose of *compromising* the debt of the city. The plaintiff was the holder of some of the coupons for the payment of interest on some of the bonds first issued.

It was claimed that they were void, being issued in violation of the constitution, and that no recovery upon them could be had, but this court held that their payment might be enforced. And Mr. J. Nelson, in delivering the opinion of the court, (9 Wall., 485,) said, "Without enquiring into this question (whether the bonds had been legally issued) it is sufficient to say that after the city had passed the ordinance, lending its credit to the railroad company to the amount of $100,000, the Legislature ratified it, *this was equivalent to an original limit of the amount.*"

Miller v. Gleason, *supra*.

This case was as follows: The constitution of the State of Wisconsin provided that no general law should be in

force until published by authority of the Legislature. The charter of the city of Madison was passed in May. Under provisions in that charter an election was held by that city in July, at which bonds were voted in aid of a certain railroad, and the bonds were issued in August. The charter was not published until the following October. Afterward, and before the suit, the city paid one or two years' interest on the bonds. Held that the charter was a general law within the meaning of that term in the constitution, affirming, so far, the decision in Clark v. City of Janesville, 10 Wis., p. 136, (to which case we desire to call the attention of this court in connection with the one now being cited,) and that it was not in force when the bonds were voted and issued. But the court also held that as all parties supposed it to be a law at that time, the principle of ratification applied, and that the payment of interest was sufficient ratification.

Applying this decision to the case at bar it follows that conceding, when the bonds were voted, no authority for the subscription existed, yet before they were issued, (instead of after, as in the case just cited,) a distinct law authorized the town to subscribe to the stock of the railroad company. And after having thus received full power to make the subscription, it ratified its previous acts.

It is said by counsel, that there is no allusion to the town of South Ottawa, in the amendatory acts of 1869. That there is no special and direct allusion to that particular town is conceded, but § 4 of the act of April 20, 1869; provides that, "all bonds issued under *this act*, or which *may be issued under the act to which this is an amendment in sums, &c*," (see Mr. Phillips' brief, top p. 17,) thus conferring power upon the town of *South Ottawa* to issue bonds *under either act.*

It is submitted that there can be no doubt as to the intention of the Legislature to confer upon the town of

South Ottawa, among others, the right to issue bonds *under the act of* 1857, of the denominations of $100, and up to $1,000.

This act was in force ten days *prior* to date of the bonds in question.

The act of February 27, 1869, is simply a clear recognition of the existence and validity of the act of 1857.

It is said these amendatory statutes go for nothing, because, as is assumed, the Legislature were under a misapprehension as to the constitutional enactment of the act of 1857.

But we respectfully submit that such an assumption cannot be entertained for a moment; but instead, these amendatory acts can only be considered as unmistakable recognitions of the validity of the act of 1857, and declarations on the part of the Legislature that the act of 1857w as *constitutionally* passed.

It seems to us there can be no possible doubt as to the *intention* of the Legislature in the passage of the acts of 1869. They must necessarily be considered as declarations beyond all possible question to the world that the act of 1857 was a valid statute, and entitled to full faith and credit as such to *all persons* whomsoever. And if it is "clearly apparent" that such was the *intention* of the Legislature, (and, we will add, if such be the necessary legal effect of the enactments,) which we submit in this instance is the case, it is immaterial whether such recognition is expressed or implied. This subsequent legislation is not only a recognition of the prior act, but is substantially, and to all intents and purposes, a re-enactment of it, and upon every principle upon which the imperfect execution of assumed powers under similar statutes, by reason of want of conformity to the imperative provisions of the statute, have been validated by subsequent legislation, these enactments of

1869 must be held to validate the bonds in question. Though the vote in pursuance of which the bonds were issued was taken prior to the passage of the amendatory acts, the vote was taken under *color of law*, in pursuance of a legally published public law, promulgated by those charged therewith, and clothed with all the outward *indica* of genuiness and validity, and the expression of the will of the people at the election was as complete as if the journal of the Senate had embraced all that it is claimed it should have contained, but did not, to make the act of '57 a valid law.

The plaintiff in error has received the consideration for its bonds issued under this assumed law, and should not be permitted to question the right of the plaintiff below to a recovery. The defendant in error does not occupy the position of the holders of the bonds involved in the case of the Loan Association vs. The City of Topeka, (20 Wall., 665,) in which case the bonds were issued as a mere *donation*, and not for a public and corporate purpose.

II.

The appearance of the act of February 18, 1857, among the public Statutes of the State, supported as it was by the certificate of the Secretary of the State, that the enrolled bill remained in his office properly signed by the President of the Senate and Speaker of the House of Representatives, and attested by the signature of the Governor, afforded a presumption, at all events, that this act was a valid law and had constitutionally passed, and upon which the defendant in error had the right to rely.

In the case of Pease vs. Peck, 18 How'd, 595, the question arose upon a discrepency which was discovered between the original manuscript of the territorial laws of Michigan and the published revision thereof. This court

in commenting upon the question, per Mr. Justice Grier (p. 597) says: "Yet, as the people who are governed by the laws, and the courts who administer them, practically know the laws only from the *authorized publication* of them, the propriety of recurring to ancient, altered, and erased manuscripts, for the purpose of changing their construction after the lapse of thirty years, and after their construction has long been settled by the courts, and has entered into the contracts and business of the citizens, may well be doubted. The reception and long acquiescence in them *as printed and distributed* by authority, by those who had it in their power to alter or annul them, and did not, may *justly* be created as a *ratification* of them by the sovereign people."

It must be conceded—indeed, it is conceded by the Supreme Court of Illinois—that the published statutes, attested by the signature of the presiding officers of both Houses and of the Governor. create a presumption that they were constitutionally passed. (Spangler vs. Jacoby, 14 Ill., 298, and other cases cited by counsel for plaintiff in error.)

So strong is this presumption, that in the case of the Illinois Central Railroad vs. Wrenn, 43 Ill., 77, the court, per Mr. Justice Lawrence, say: "The laws certified by the Secretary of State, and published by the authority of the State, must be received as having passed the Legislature, as required by the Constitution, unless the contrary clearly appears. * * * We take judicial notice of all acts of the Legislature signed by the Governor, and found in the office of the Secretary of State, and although for some purposes we may take judicial notice of the Legislative Journals, yet, it is not our province at the suggestion of counsel, to undertake to explore these Journals for the purpose of ascertaining the manner in which a law, duly certified, went through the Legislature and into the hands of the Governor."

If the presumption of the existence and validity of a law thus authenticated and promulgated be so strong, that the highest judicial tribunal of the State will accept it, take judicial notice of it, and decline to even look at the printed Journals to which they are referred, for the purpose of impeaching it, and this, though the question pending involves the property, personal liberty, or even life of a citizen, with what propriety can it be urged that the *bona fide* purchasers of negotiable securities, purporting to be issued in pursuance of a statute thus authenticated, published and promulgated by authority of the State, and which the highest judicial tribunal of the State would make the basis of its judgment, should rummage in the musty vaults of the office of the Secretary of State "to find the true expression of legislative will," reposing in the crypts of the Secretary's office," as was said by Mr Justice Grier in Pease vs. Peck, *supra.* To require such vigilance to discover the power of a municipal corporation in the face of the published statute, and its repeated recognition by the Legislature, would, as further stated by the learned Judge, "simply be to require something impracticable, and cast suspicion upon and defeat the negotiation of all public securities dependent upon Legislative authority for their validity."

The corporate authorities and the People of the Town of South Ottawa, and all whom it concerned, had the *right* to *presume* that the act of 1857 had constitutionally passed.

If the General Assembly had passed an act and provided therein that it should take effect from and after its passage, and through inadvertence on the part of the Secretary of the Senate, he had omitted to enter upon the Journal the final vote by ayes and noes upon its passage, the same General Assembly at that or a subsequent ses-

sion, would have had the right to correct its journal in this respect. Finley v. The County of Logan, 17 Ill. 153. What then would be the *status* of the *act* intermediate, its passage in point of fact, and the correction of the record? Upon the theory of counsel for plaintiff in error, all proceedings had under the act in the *interim* would be void.

In the case last cited an act was passed for the removal of the county seat of Logan County at the session of the General Assembly, held in 1853. In the fall of 1853 a vote was taken under this act, in favor of a removal. Thereupon some dissatisfied parties made the discovery of the fact, that the Journal failed to show that the bill had been read three different times as required by the Constitution, and filed a bill in chancery, and obtained an injunction restraining the erection of county buildings, upon the ground that the bill had not been read three different times, and was not a valid law. The Legislature, at a special session in February, 1854, amended its record in this respect, and at the *next* term of the court, thereafter, the defendants filed their answer setting up the fact, and upon hearing, the Circuit Court dissolved the injunction and dismissed the bill, holding that the subsequent correction of the Journal obviated all objections to the validity of the proceedings of the county officers and dismissed the bill, which decree was sustained by the Supreme Court of the State.

In the case of Grogan v. San Francisco, 18 Cal., 611, Mr. Chief Justice Field, in delivering the opinion of the court, says: "The State may ratify the acts of her agents within the constitutional control of the Legislature, when they exceed their powers; she may do this by legislation directly affirming their acts or by legislation proceeding upon their *assumed* validity."

III.

The acts of March 27, and April 20, 1869, were not only, as we have endeavored to show, legislative recognitions of the validity of the act of February 18, 1857, but were curative in their effect, of the defects, if any, of the latter act, and whether expressly or by implication, is immaterial.

Campbell v. Kenosha, 5 Wall, 72.
The City v. Lamson, 9 Wall, 477.
People v. Mahoney, 14 Mich. 496.
Board Coms., &c., v. Bright, 18 Ind. 316.
Wyman v. The City of Macon, 21 Geo. 275.
Supervisors v. Schenck, 5 Wall, 722.
The City of Atchinson v. Dutcher, 3 Kan. 104.
Steins v. Franklin Co. 48 Mo. 167.
Mills v. Gleason, 11 Wis. 470.
Hannibal & St. Jo. R. R. Co. v. Marion Co., 36 Mo. 294.
St. Joseph's Township v. Rogers, 16 Wall, 659.
Olcott v. Supervisors, 16 Wall, 668.

It is urged by counsel that to recognize these statutes as curative or amendatory of the act of 1857, and as ratifying the election previously held, would be in effect an attempt by the legislature to impose a debt upon the town IN INVITUM, and therefore repugnant to sec. 3 of art. 9 of the constitution of Illinois of 1848.

Such is not the effect of the acts of 1869. They neither of them, we think, fall within the principles of the decisions of the Supreme Court of Illinois cited in support of this position by counsel for plaintiff in error.

Howard v. St. Clair Co., 51 Ill., 130, was an attempt by the legislature to vest in a private corporation the power of taxation, which manifestly could not be done, and this was the only question determined or assumed to be determined by the court. The court holding that

it was the intention of the constitution to define the class of persons to whom the rights of taxation might be granted, and the purposes for which it might be exercised, and that having done so, this was a limitation of power, and the legislature could not delegate its exercise to persons or bodies not the corporate authorities of the municipality.

In the case of the People v. The Mayor, &c., 51 Ill., 18, the court held that the power of imposing taxes was vested in the *corporate authorities* of the City of Chicago, viz, the common council. The legislature, by a special act, created a board of commissioners for the improvement of Lincoln Park, with the power to acquire lands by purchase and condemnation, to issue bonds therefor, and to pledge the property of the city and that acquired by the commissioners for the payment of the bonds. The proceeding was an application for a mandamus to compel the execution of the bonds by the commissioners. The court held, as in Howard v. St. Clair Co., that the power of creating this debt and providing for its payment was, by the limitation imposed by sec. 3 of art. 9 of the constitution, vested in the municipal authorities, viz, the common council, holding, (per Breese, C. J., p. 312.)

But the court further say, (1) "if, however, the common council, clothed as it is with power over this whole subject of parks, and with power to direct the issue of bonds, shall pass an ordinance directing the mayor, &c., to issue these bonds and they should refuse, we might compel them by mandamus," &c.

It is further remarked that the court expressly declined to pass upon the question as to whether the legislature might compel a municipal corporation to create a debt for such a public improvement.

Chief Justice Breese, speaking of the conflicting views

upon this subject, says, (51 Ill., p. 30,) "we do not consider thatit is necessary we should attempt to settle these conflicting opinions, as this case does not seem to require it. We are inclined to think as a new exercise of the taxing power it would be difficult to sustain this law under sec. 5 of art. 9 of the constitution."

Irrespective of the question of Legislative power in this respect, the cases last noticed, and so confidently relied upon by counsel for plaintiff in error, cannot be considered as authorities binding upon the court with respect to the validity of the bonds in question.

In the case of *Marshall* vs. *Silliman*, there was absolutely no power nor even color of authority for the vote to issue $15,000 of bonds in excess of the $35,000 authorized by the act of the Legislature. The town authorities and the voters perfectly well understood that there was no authority for it to be found in the statute. It seems that a pretence was afterwards made in order to sustain it, that it might be done under the township organization law; but this was deemed too trivial to be worthy of consideration by the court. This unauthorized vote to subscribe the additional $15,000, it is evident, was taken with a full understanding that it was void, but upon the supposition that the Legislature could be induced to and would thereafter validate it by special legislation, which it assumed to do.

The vote to issue $15,000 of bonds was unquestionably void, but the curative act assumed to make the issue of the bonds imperative.

This was the only question the court was called upon to decide, and beyond this decision the case has no weight, and is entirely foreign to the question presented by this record.

As we have before remarked, the election in the case of the town of South Ottawa, was held under a law to

say the least, *prima facie* valid, and authoritatively promulgated so, that obedience to it, could have been compelled by the aid of the Judicial Department of the Government. The legal voters and officers of the town were fully apprised of its objects and purposes, and were not required to look beyond the published statute. By the first section of the act, it is made the duty of town clerk to call the election in the case of a town, and in the case of a vote in favor of the issue of bonds, it was made the duty of the county authorities or the corporate authorities of the town (meaning incorporated towns or villages and cities), and the supervisor and town clerk in the township, as the case might be, to issue the bonds.

Who of the town officers were the proper *corporate authorities* to perform this particular duty, it was most certainly competent for the Legislature to provide; and in this instance it did so provide, and designated the town clerk and supervisor—acting under and in pursuance of the vote of the legal voters of the township—two of the town officers elected by the people,as the appropriate corporate officers to perform this duty.

The supervisor and town clerk being by common consent and universal usage, wherever the system of township organization prevails, as is believed, the recognized and conceded proper town officers to perform such duties.

It is not claimed that this amendatory act of April 20, 1869, confers absolute power upon the town clerk and supervisor to issue the bonds regardless of the will of the people. As has been before remarked, the second section of this act provides, that the additional subscriptions authorized by it shall only be made when an *election has been held*, "as is provided in the act to which this is an amendment." And the fourth section provides "that all bonds issued under this act or to be hereafter issued

under the act to which this is an amendment shall be issued in sums," &c., clearly indicating that *only* in cases of an election held under and in accordance with the original or amendatory act would the supervisor and town clerk be authorized—as the proper town authorities—to issue the bonds. (Laws of Ills. 1869, vol, 3, p. 362.) And the amendment to the charter of the R. R. Co. also provides that a subscription may be made upon the terms *and conditions prescribed* by the act of February 18, 1857. (Private Laws of Ills. 1869, vol. 3, p. 329.)

The legislature had full and adequate power to thus validate the act of the town of South Ottawa in voting the issue of the bonds in question if, any ratification thereof were required.

Supervisors of Mercer Co. vs. Hubbard, 45 Ills., 139.

The President, &c., of Keithsburgh vs. Frick, 34 Ills., 405.

Crogill vs. Long, 15 Ills., 202.

Olcott vs. Supervisors, 16 Wall., 678.

St. Joseph Township vs. Rogers, 16 Wall., 678.

Cooley on Const. Law, 370 to 381, and notes.

IV.

The original act of February 18, 1857, duly attested by the signature of the President of the Senate and the Speaker of the House of Representatives and the Governor of the State, remaining in the office of the Secretary of State, and the publication thereof by the authority of the State among the published laws of the General Assembly, when the facts disclosed by this record import *absolute verity,* and it was not competent in this action to go behind the published statute, to impair its validity and the court committed no error in refusing the evidence offered by plaintiff in error upon the trial in the

court below, nor in sustaining the demurrer to the defendant's plea.

The Louisiana State Lottery Co. v. Richoux,
23 La. An. 743.
Eld v. Gorham, 20 Conn. 16.
Fletcher v. Peck, 6 Cranch, 131.
Warner v. Beers, 23 Wend. 125.
(See opinions of Verplank Sen. 113 & Bradish
Prest 171.)
Dwaris on Statutes 629 to 637.
King v. Jeffries, 1 Str. 446.
King v. Rothbottam, 3 Burr, 1472.
King v. Arundel Hobart, 109.
The Prince's Case, 8 Coke, 145.
Co. Lit. 986.
Comyn's Dig. Title "Parliament."
The People of Devlin, 33 N. Y. 569,
and cases cited—see opinion of
Potter J. 275 to 281, and opinion,
Campbell J., 283 to 286.

As opposed to the doctrine laid down by the Supreme Court of Illinois in Ryan v. Lynch and Miller v. Goodwin, we desire to call the attention of the court to the preceding cases and particularly to the case of Eld v. Gorham.

In this case it was held "that when the Legislature constituted a certified copy of an act an *authentic record* of the statute laws of the State, it has the same force and effect as if it were in truth a portion of the *original records*, as to its constituting *evidence* of what is stated in it; as such it imports *absolute verity*, is, in itself, conclusive evidence of what it states, * * "it can neither be contradicted or varied as to any of the facts of which it professes to be the memorial, and no evidence is ad-

missable because it would be unavailable for that purpose."

In the People v. Devlin, (33 N. Y. 279) Mr. Justice Potter says, "I am of opinion that the Legislative Journals were not legitimate evidence to impeach the statute produced, they (as in Illinois) are not made so by statute; *they were never made so at common law*, * * they are doubtless evidence from the necessity of the case, * * * to prove the proceedings of the *body whose records they are*, because the constitution requires them to be kept; * * * but to impeach the force and effect of a solemn statute, duly certified, no authority can be found within the limits of my research, to admit them to be legitimate evidence, but much authority to the contrary." The learned judge then proceeds to consider the cases bearing upon the subject; but it is due to him to state that Ryan v. Lynch and Miller v. Goodwin had not then been decided.

Mr. Justice Campbell, in the same case, (p. 283) says: "when a law confessedly within the power of the Legislature to make comes down to the *people*, authenticated by the presiding officers of the respective Houses, approved by the Governor and certified and declared by the Secretary of State to be the law of the State, *no citizen*, I think, in a *private controversy*, can call upon the courts to go behind the record thus made up, and impeach the validity of the law."

The attention of the court is also called to the other cases cited and commented upon by Justices Potter and Campbell and particularly to their review of Warner v. Beers and Purdy v. The People, relied upon by the adversaries.

The English cases cited are clearly and most emphatically against the position taken by the Supreme Court of Illinois in Ryan v. Lynch and Miller v. Goodwin, if we

give to those decisions the scope and effect claimed for them by our learned friends on the other side.

Those cases, however, were simply suits to enjoin the collection of a tax to pay interest upon the bonds. The true effect to be given them is to consider them as simply determining that the law never passed, therefore they would not permit the machinery of the State government to be used to give effect to a declared void statute. All that is said or intimated beyond the precise point involved and adjudicated, is mere *dictum*, and should not be permitted to control the determination of this court, in adjudicating upon the private rights of innocent holders of commercial obligations. The court took no cognizance of the rights of the holders of the bonds. The bondholders were not parties to the suit, and the court did not and could not judicially know, whether in fact there were any innocent holders for value of the bonds.

The Supreme Court of Illinois has never held that the *bonds* in question could not be recovered upon at the suit of *bona fide* holders and we cannot assume that it ever will so hold; on the contrary, we confidently believe that after a more mature consideration of the matter, if it should ever come before it, that court will, in harmony with the principles it has so repeatedly declared, in the cases we have cited and the rule applied by this court, as we understand its decisions, respect and protect the rights of the innocent holders of these bonds against the great wrong and fraud attempted to be perpetrated upon them by these municipalities.

That this question is purely a question of evidence, and not a question of constitutional interpretation, must be conceded from the manner the Supreme Court of Illinois has treated it thus far; for upon one state of facts they hold the statute is a valid law, that it is *prima*

facie valid—while upon another state of the case, made by the introduction of evidence as to what does or does not remain hidden in the crypts of the office of the Secretary of State, they hold it to be no law; so that by a convenient and adjustable rule of evidence, they determine whether the law is a law: that is to say, they determine the question as to whether there is such a statute according to the *sufficiency of the evidence* in a given case.

The plea that this was no such law of the act of February 18, 1857, was clearly bad.

People vs. Purdy, 4 Hill. 394.
Warrener vs. Beers, *supra.*
Comyn's Dig. Supra, and Coke Lit. *supra.*

The demurrer was properly sustained to the plea of "special traverse."

Instead of being a special traverse, it traversed very generally and in all directions; it was bad for duplicity; it tendered numerous immaterial issues, and issues which could not be tried by a jury. The demurrer was special and clearly sustainable. (See Record, p. 10.)

It was, among other things, a plea of mutilated record to the statute in question, which cannot be pleaded.

V.

The question as to the validity of these bonds issued in this court will determine for itself and will not be bound by the adjudications of the State courts if in conflict with the convictions of this court.

Butz v. The City of Muscatine, 8 Wall, 575.
Jeff Bank v. Skilly, 1 Black, 436.
McCracken v. Haywood, 2 Hood 608.
Township of Pine Grove v. Talcot, 10 Wall., 666.
Supervisors v. Olcott, 16 Wall, 668.
St. Soseph Township v. Rogers, 16 Wall., 668.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE TOWN OF SOUTH OTTAWA, Plaintiff in Error,
vs.
NOAH C. PERKINS, Defendant in Error. } No. 58.

BOARD OF SUPERVISORS OF KENDALL COUNTY,
Plaintiff in Error,
vs.
AUGUSTUS T. POST, Defendant in Error. } No. 59.

Brief in support of the validity of the law under which the bonds in question were issued,

BY

ISAAC G. WILSON.
SANFORD B. PERRY.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE TOWN OF SOUTH OTTAWA, Plaintiff in Error,
vs.
NOAH C. PERKINS, Defendant in Error. } No. 58.

BOARD OF SUPERVISORS OF KENDALL COUNTY,
Plaintiff in Error,
vs.
AUGUSTUS T. POST, Defendant in Error. } No. 59.

Brief in support of the validity of the law under which the bonds in question were issued.

THE CONSTITUTION AND STATUTES OF THE STATE OF ILLINOIS, TO WHICH REFERENCE SHOULD BE MADE IN ORDER TO AN INTELLIGENT UNDERSTANDING OF THE QUESTIONS WHICH ARE COMMON TO BOTH OF THESE CASES, ARE AS FOLLOWS:

Constitution of 1848.

"Each House shall keep a journal of its proceedings and publish them." (Art. 3, § 3.)

"On the final passage of all bills the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each House." (§ 21.)

"The General Assembly shall provide by law that the *copying*, *printing*, binding and distributing the laws and journals shall be let by contract to the lowest responsible bidder." (§ 39.)

"Every bill having passed both Houses shall be signed by the speakers of the respective houses."

"Every bill which shall have passed the Senate and House of Representatives shall, before it becomes a law, be presented to the Governor," &c. (Art. 4, § 21.)

Statutes.

1. "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads." Approved 18th February, 1857.

2. "An act to amend an act entitled, An act to incorporate the Ottawa, Oswego, and Fox River Valley Railroad Company." Approved 27th March, 1869.

3. "An act to amend an act entitled, An act authorizing certain cities, counties, towns and townships to subscribe to the stock of certain railroads, in force February 18, 1857." Passed 20th April, 1869.

For the body of the above three acts, reference is made to pp. 2, 3, 4 and 5 of the brief of Messrs. Hay, Greene & Littler, filed herein.

Rev. Stat. of 1845, ch. 84—

"§ 1. Provides for the appointment of a public printer.

"§ 2. Provides that all laws, journals, &c., ordered to be printed, shall be given to the public printer.

"§ 3. Provides that the Secretary of the Senate, &c., shall furnish to the public printer *every morning* during each session of the General Assembly, a copy of the journal kept by him, of the day preceding the last day's journal, and the said Secretary shall, within ten days after the adjournment of each session of the General Assembly, *deposit the original journals*, kept by him as aforesaid, with the Secretary of State."

Stat. of 1849, 2 Scates' Stat., 734—

"§ 3. Provides that the Secretary of State shall *advertise for proposals* for copying the journals.

"§ 4. Provides that the Secretary of State shall furnish a 'well-bound book,' in which the journals shall be copied."

Stat. of 1869, 1 Gross St., 417; ed. of 1869—

"§ 13. Provides that the *copying of the journals*, &c., of each General Assembly, shall be done under the *personal supervision* of the Secretary of State, and *such* copies shall be *carefully compared* with the *originals* in his office before being printed, and in no case shall he permit the originals to be taken from his office."

Stat. of 1869, 1 Gross Stat., 681—

"§ 9. Provides that copies of all bonds, papers, writings, and documents *legally deposited* in the office of the Secretary of State, when certified by the Secretary of State, and authenticated by the seal of his office, shall be received in evidence in the same manner and with like effect *as the originals*."

ABSTRACT OF THE JOURNALS OF THE SENATE AND HOUSE OF REPRESENTATIVES SOUGHT TO BE INTRODUCED IN EVIDENCE TO OVERCOME THE ENROLLED LAW, AS DEPOSITED IN THE OFFICE OF THE SECRETARY OF STATE.

It is admitted that the House journals show that the act was duly passed, that the same was duly certified to the Senate, and the concurrence of the Senate therein asked.

Then follows from the printed Senate journal, under date of 14th of February, 1857, the following, to wit:

"A message from the House of Representatives by Mr. Boal, a member.

"Mr. President: I am directed to inform the Senate, that the House of Representatives have passed bills of the following titles, viz:

"A bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads."

Under date of 16th February, 1857, the following, to wit:

"House bill for an act authorizing certain cities, counties, and incorporated towns or townships, to subscribe to the stock of certain railroads, was read a first time and

ordered to a second reading. On motion of Mr. Fuller, the rule was suspended, the bill read a second time by its title, and referred to the Committee on Banks and Corporations."

The above is all that is shown by the printed Senate Journal of that year.

Under date of 17th February, 1857, the printed House Journal shows as follows, to wit:

"A message from the Senate by Mr. Wyatt, Assistant Secretary:

"*Mr. Speaker:* I am directed to inform the House of Representatives that the Senate have *concurred* with them in the passage of bills of the following titles, to wit:

"A bill for an act authorizing certain cities, counties, incorporated towns and townships, to subscribe to the stock of certain railroads.

"Mr. Goudy, from the Committee on Engrossed and Enrolled Bills, reported as correctly enrolled, bills of the following titles, to wit:"

[Same title as above.]

Under date of 18th February, 1857:

"A message from the Governor by Benjamin F. Johnson, Private Secretary:

"*Mr. Speaker:* I am directed by the Governor to inform the House of Representatives that he has approved and signed bills of the following titles, to wit:"

[Here follows the same title.]

UNDISPUTED FACTS.

The act of 18th February, 1857, entitled as above specified, was duly and properly enrolled, was signed by the President of the Senate and Speaker of the House of Representatives, approved by the Governor, and then deposited with the Secretary of State; and by authority of law duly promulgated to the world as a valid law of the State of Illinois.

That for upwards of fifteen years no question was raised as

to the validity of this act; and transactions to a very large amount between citizens of Illinois, and between citizens of that and of other States, have been in good faith based upon it.

That the *printing* and *copying* of the legislative journals, were, under the direction of the constitution, *let to the lowest responsible bidder*.

That prior to the year 1869, there was no provision of law requiring any officer of the State, high or low, to personally supervise the printing or copying of these journals, or to compare the copies, when so made, with the originals; and that these copies were never certified to as correct by any one; and that in point of fact the *originals* of these journals were not preserved, and cannot now be found.

That prior to 1869 there was no statute of Illinois making copies, even of the *original* journals, evidence.

That in 1869, a law was passed requiring the copying of these journals to be done under the personal supervision of the Secretary of State, requiring such copies to be carefully compared with the originals, and prohibiting the Secretary of State from allowing the *original* journals to be taken from his office, and making certified copies of the *original* journals evidence, of same force *as* the originals.

ARGUMENT.

I.

We are met in the outset of this case by the claim that the Supreme Court of Illinois has passed upon the validity of the act of 18th February, 1857, and declared it void because not constitutionally enacted, and that this Court is bound by the decision of that court.

If the question to be decided came within the rule of this Court, "that it will adopt and follow the decision of the State courts in the *construction* of their own constitution and statutes," there would be some ground for the claim.

But that is not the question in issue. The constitution of Illinois, and the act of 1857, are both plain and simple, and need no construction; and none has been given to either by the Supreme Court of Illinois, and none is sought from this Court.

The sole question to be decided, in reference to the act of 1857, is this: is that act a *law* of the State of Illinios.

This is not a question of *construction*, but a question of *evidence* simply—a question as to the *existence* of the law. It is a question of *fact*, and belongs to the domain of general jurisprudence, and the decision of one court, or of one jury, cannot bind another on such an issue.

And as this Court has said in *Township of Pine Grove* vs. *Talcott*, 19 Wall., 666:

"Questions relating to bonds issued in a negotiable form, under an act of a State Legislature, involving questions relating to commercial securities, and whether under the constitution of the State such securities are valid or void, belongs to the domain of general jurisprudence. This Court will, accordingly, not follow the decisions of the courts of the State where the bonds are issued, as to their validity and constitutionality under the laws and constitution of the State, if the judges here disapprove of those decisions."

All the cases bearing upon the subject of this discussion treat the question as one of *fact solely:* those that hold it competent to go *behind* the enrolled law for proof touching the question of its due passage by the Legislature, as well as those which hold the enrolled law a *record* which cannot be impeached by extrinsic evidence.

This is shown by the cases hereafter cited, and it is shown by the Illinois cases, as they all admit and consider evidence, and pass on the question as one to be *proved*. They admit that the *presumption* is in favor of an enrolled law, but hold that this presumption may be overcome by *proof*.

II.

There is no doubt that the constitution adopted by the people of a State, and the laws enacted in pursuance thereof, are, as to them, wholly binding. It may be admitted, without prejudice to the claim of the defendant, that they can adopt such constitutional provisions relating to the mode of enacting laws as they may deem best; that they may make these requirements, as to themselves, absolutely essential to the validity of a statute; that they may provide, as to themselves, that a statute, published under authority of law, or a statute duly enrolled and certified to in the manner provided in their constitution, and deposited with the Secretary of State, may be shown by proof not to be a law; that they may provide, as to themselves, that the whole body of their apparent statute law, of whatever age, may be liable to a jury trial to determine the fact whether or not each and every part thereof was passed in the precise mode, in all the details thereof, required by their constitution.

This may be a ruinous policy, and subversive of all justice, but non-residents of that State cannot be heard to complain of any hardships which the people voluntarily impose upon themselves.

But when a State undertakes to impose this rule upon non-residents who have in good faith relied upon the statutes of the State, published under its authority, or upon the enrolled laws, deposited with the Secretary of State, as the law of that State, a very different and much more serious question arises.

The legislators, the Governor, and the Secretary of State are the duly constituted agents of the people, and of all the people, of a State. When the acts of these agents are duly and solemnly promulgated to the world as the law of that State, non-residents of that State, as a matter of public policy, as well as of common right, should be protected by all courts, when they have secured rights under the acts so

promulgated. Non-residents of that State should be guaranteed absolute safety in any action taken on the faith of such acts as the law of that State; and the people of that State, either as a whole, or in municipal parts, or as individuals, should never be permitted, as against vested rights, thus obtained, to allege anything against the validity of their acts thus published as law. Their agency in passing and promulgating an act as a law of that State should *estop* them from denying its validity when invoked in aid of rights and interests predicated thereon. This is the universal rule as applied to individuals. It is a rule of morals as well as of law; and no good reason can be assigned why it should not apply to municipalities as well as to the individuals composing the municipality.

The cases in the books which hold that it is competent to go behind the enrolled law to the journals or other sources of proof for evidence as to the due passage of a law, are, so far as we can ascertain, all cases between citizens of the State holding this rule. The question as to what is the true rule between a citizen of the State enacting the law and holding this rule, and the citizen of another State who has in good faith acted upon the enrolled law as valid, has never been raised in any court, so far as we can ascertain, and is now for the first time presented for adjudication.

In the case of *The Town of Coloma* vs. *Eaves*, decided by this court at the last term, the true rule, as we apprehend, was suggested by the Court, in discussing a question quite similar to this.

The town had subscribed for stock in a railroad and issued its bonds in payment therefor. In a suit upon the bonds it set up, as a defense, that the bonds were issued without lawful authority.

The Court, in deciding the case, says:

"Saying nothing at present of the *dishonesty* of such a defense, while the consideration for which the bonds were given is retained, we come at once to the question whether

authority was shown for the stock subscription and for the consequent issue of the bonds. At the outset it is to be observed that the question is not between the town and its agents. It is rather between the town and a person claiming through the *action* of its agents. The rights of the town as against the agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority."

Apply the principle thus announced to this case, and it is this: The question is not between citizens of Illinois whose agents are claimed to have failed to observe all the requirements of their constitution in the enactment of the statute. If it was, and they suffer in consequence of the negligence or fraud of their own agents, they have no redress, except as against them. But this is a case where a non-resident of Illinois has placed implicit reliance upon the acts of the duly constituted agents of the people of Illinois, and in good faith has acquired rights based on those acts; and, indeed, the case goes much further, and is still stronger than that. The people of certain municipalities in Illinois, whose duly constituted agents *assisted* in causing this act to be duly enrolled, certified, and published, have themselves solemnly acted upon this enrolled law as *valid*, and have thus given to this non-resident direct, positive, and unequivocal assurance that it is safe for him to act likewise. Can such a municipality be permitted in any court of justice in Christendom to set up as a defense to its obligations thus assumed, that it had no *authority* to enter into them, because, forsooth, all the constitutional requirements were not observed by its *agents* in the passage of the law under which it acted, and, *therefore*, it should be allowed to retain all the *benefit* of the obligation, and the poor defrauded non-resident should bear all the loss? Let every *municipality*, as well as every man, be compelled to do as he would be done by.

III.

The presumptions in favor of the validity of an enrolled

law duly certified and deposited with the Secretary of State and duly published and promulgated as a law of the State enacting it, are held conclusive by the weight of authority; and even the States which allow this presumption to be overcome by proof, regard this presumption as *almost* conclusive.

Take the State of Illinois as an illustration. The Illinois Revised Statutes of 1845, p. 232, provide that—

"The printed statute books of * * this State, purporting to be printed under the authority of the State, shall be evidence in all courts and places in this State of the acts therein contained."

A non-resident would naturally suppose that this meant something more than *prima facie* evidence. He would not for a moment imagine that the courts of that State could hold that the statute, thus promulgated, may or may not be a law, as may be determined upon a hearing of all the facts tending to show whether or not all the constitutional requirements were observed in its passage by the Legislature.

In *Larrison* vs. *Railroad Company*, 77 Ill., 12, the latest published utterance of that court, it says:

"If we find a law signed by the speakers of both houses, and approved by the Governor, we must *presume* that it has passed in conformity to all the requirements of the constitution and is valid, until the presumption is overcome by *legitimate* proof. And in such a case the evidence must be *clear* and *convincing*. It is by no means sufficient to only create a *doubt* whether the requirements of the organic law have been observed, but it must be *clearly proved*.

IV.

It will be instructive to examine this case upon the rule of evidence as held by the Supreme Court of Illinois. It is this, as declared in the case of *Larrison* vs. *Railroad Company*, above cited.

The presumption is that a law duly signed by the speakers of both houses, and approved by the Governor, was passed in conformity to all the requirements of the constitution, and is valid. But this presumption may be overcome by *legitimate proof*, and it is not sufficient that this proof only creates a *doubt*, it must be *clear* and *convincing*. The fact of non-conformity must be *clearly proved*.

We deny that by any well-considered rule of law it is competent to overcome this presumption by any kind of proof. But for the sake of the argument let the case be considered for a moment upon the rule declared in the above case, bearing constantly in mind that none but *legitimate proof* can be considered. This is an issue of fact, and must be tried solely upon evidence competent and legitimate under any issue of fact to which it would be applicable.

The first piece of evidence offered on this issue is what is called the *printed journals* of the Senate and House of Representatives for the year 1857. It is not claimed that these are the *original* journals, or that they have, by any officer of the State, high or low, or by any other person, ever been compared with the originals and certified to be correct. The only claim that can be asserted for them is that they were printed by some person who, under the competition provided for by the statute, had been selected to do the public printing at the lowest price.

Was this "*legitimate proof*" on this issue? Let the Supreme Court of Illinois answer. In *I. C. R. R.* vs. *Wren*, 43 Ill., 77, they say:

"We are not aware of any law which makes the *printed* journal evidence of the *original*."

The next, and only other piece of evidence offered in support of this issue, is a certified copy from the "well-bound book," found in the office of the Secretary of State. What is this book, and how was it made? The statutes above quoted answer this question. The book, as a book, was

provided by the Secretary of State in which to have the original journals of the Senate and House copied. The copying of these journals was, under the statute, let to some one who would do it for the *least* money. This book purports to contain copies of these journals. But they were never compared with the originals by anybody, not even by the impecunious copy-writer, so far as appears. There is no certificate of any kind attached to this book showing that it is a copy of anything. The most that can be said of it, it reads like journals of the Legislature.

The Supreme Court of Illinois, in the case above cited, did not say, because they probably had no occasion to say, that "we are not aware of any law which makes this well-bound book evidence of the original journals of either branch of the Legislature;" but if they had been called upon to say *anything* in relation to this book, they must have said of it the same as they did of the printed journals. Both stand upon precisely the same authority; were procured under the mandate of the same statute. Neither of them are *originals*, and neither of them have been compared with, or certified to as copies of, the originals. They were not proved, and cannot be proved by any evidence to be copies of the originals. The original journals are lost, and could not be produced in evidence.

Is it not surprising that these books could be considered, for a single moment, as *legitimate proof?* Do they clearly prove *anything* beyond their physical existence? Do they even create a *doubt?* Is it upon such *stuff* as this that statutes are to be upset, and immense interests destroyed? It does not take even the initial step towards clear and convincing proof.

In this connection it should be borne in mind that there is no statute law of Illinois that makes this printed or written book, or any copies certified therefrom, evidence in any court upon any issue.

The Supreme Court of Illinois, in one of the cases cited

by counsel, is driven, by the untenable position which it took, to create a new name for the journals of the houses as kept by the respective secretaries. It calls them "minutes of the journal," and treats the "well-bound books" as the original journals. Let us consider how this invention is supported by authority.

Section *three* of the act of 1845, above quoted, provides that the *Secretary of the Senate* (not of the State) shall furnish to the public printer, *every morning*, during each session of the Legislature, a *copy of the journal kept by him*, &c., * * * and the said Secretary shall, within ten days after the adjournment of each session, &c., deposit the *original journals kept by him as aforesaid*, with the Secretary of State.

What ground is there for calling the work of the Secretary of the Senate "Minutes of the journal?" Did he make no more than *minutes?* Did he not make up the *whole* journal, *every day*, and deliver the same to the printer, the precise and complete journal which it was his duty to print? Is it not a misnomer to call a complete record of the day's proceedings, *minutes?* If but minutes, whose duty was it, after they had left the hands of the Secretary of the Senate, to amplify, extend, and perfect them as a record? Was it the duty of the public printer, or of the Secretary of State? Who but the Secretary of the Senate could make any record of the proceedings of that body which would be legitimate? Who had the right to add a word to, or substract a word from, the record as prepared by him? If no one, then by what authority or reason, call his work "*minutes*," and the same, when copied into a book, "original journals." The bare statement of this proposition, in view of the statute, shows that what leaves the hands of the Secretary of the Senate is the true, complete, and only original journal of the proceedings of the Senate, and is in no sense minutes of the journal.

Since there are no original journals of the Legislature on file in the office of the Secretary of State prior to 1869, it

is *probable*, and if we could refer to the evidence on file in this case, we could make that probability sufficiently certain, that the Secretary of the Senate, instead of making a copy of the journal every day for the printer, as directed by the statute, gave to the printer the *original journals*—that after the printing, the original journals were thrown into the waste basket, and the printed copy sent to the office of the Secretary of State, and the copy in the "well-bound book" made from the printed copy.

This loose, utterly unlawful, unreliable and alarming condition of the journals of the Legislature, became so apparent, that the Legislature in 1869 passed the law above mentioned to correct the evil. The Legislature thus solemnly recognized the fact that there was, up to that time, nothing in the possession of the State which could be even called or used as evidence of what the Legislature in fact had done. They *then* provided, by the act above quoted, that the *copying* of the journals should be done under the *personal supervision* of the Secretary of State; that the copies made by him should be *carefully compared* with the *originals*, and that in no case should he permit the originals to be taken from his office.

The journals were made just the same *before* the passage of this act as they were *afterwards*. The well-bound book is the same, except that it is written under different authority and compared with the originals. The *originals* are now *preserved*, and they are called what they always have been called, and what the statute of 1869 called them, *original journals*, and not "minutes of the journal."

Again, for the sake of the argument, let us consider what is in fact shown by these printed journals and the well-bound book, which is but a copy of the printed journals. Let us consider whether, if taken as a whole, these journals do not show, *substantially*, that the act was constitutionally passed by both houses of the Legislature.

We must bear in mind, constantly in considering this view

of the case, that these journals are not *conclusive* evidence. They may be treated as *evidence* of what the respective houses did, and if you please *prima facie* evidence, but no more. The constitution directs the Senate *to keep a journal*, and directs it to do certain things in the passage of a bill, but neither the constitution nor any statute law makes the journal, thus kept by the secretary of the Senate, *conclusive* evidence of the acts of the Senate. It cannot be claimed, upon any satisfactory reason, that the mistakes, errors and omissions of the secretary in keeping his journal of what transpired, cannot be explained or shown by other competent evidence, even by parol evidence. This would be a doctrine altogether too dangerous to be adopted, as it would preclude the possibility of correcting any error, whether caused by the mistake or fraud of the secretary. This journal has not the sanctity of a record, as is abundantly shown by the cases hereinafter cited under another point. It is the proof of a *fact* which we are seeking. It is the *fact* whether or not the Senate, in the passage of this act, on its part, observed all the constitutional requirements. This is the issue which the court is called upon to try under the view of the law as held by the Supreme Court of Illinois, and *any* evidence tending either to establish or disprove this fact, if competent, is admissible. No testimony of any kind was attempted to be offered on this issue except the enrolled law and the journals of the two houses. We have, then, the following proofs:

Let us see, if taken as a whole, whether these journals do not show with substantial fullness that the act was constitutionally passed.

a. The journals show that all the constitutional requirements were observed by the House of Representatives.

b. The Senate journal omits to show that the bill was read a third time, and omits to show that it was passed by a majority of the members, by ayes and noes. This journal

stops after showing that the bill was read a second time and referred to the appropriate committee.

c. But the *House* journal shows that afterwards, the Senate, in a solemn and official manner, in the due and ordinary course of the business intercourse between the two bodies, sent a message to the House by the Assistant Secretary of the Senate, informing the House that the Senate *had concurred* with the House in the *passage* of this bill, and the Secretary of the House of Representatives made his record of this message in the usual course of his business.

The House then proceeds to complete the passage of the bill by referring it to its Committee on Engrossed and Enrolled Bills, which committee afterwards reported the bill back to the House as correctly enrolled. The bill was after that signed by the speakers of both houses; the Speaker of the Senate, in thus signing the bill, further attesting, in his official capacity, that the Senate had duly passed the bill in concurrence with the House.

The absence from the Senate journal of the *affirmative* evidence that the bill was duly passed by the Senate may be treated as *prima facie* evidence that the constitutional requirements therein *not* stated were in fact not performed. This evidence is but negative, but it may be considered as *prima facie.*

Then how does the case stand?

We have, *first*, the strong and *almost* conclusive evidence that the act, duly signed by the speakers of both houses, approved by the Governors, and deposited with the Secretary of State, was duly and constitutionally passed.

We have, *second*, if you please, the strong and *almost* conclusive evidence, in the silence of the Senate journal, that the act was *not* duly and constitutionally passed.

Supposing these two presumptions are allowed to just balance each other.

We have, then, *third*, the message of the Senate to the House that the Senate *had* concurred with the House in the

passage of the bill. This is the precise *form* used in a message where the Senate, in such concurrence, had, as shown by its journal, conformed to all the constitutional requirements. The Senate meant by this message precisely what it meant by all other like messages, that it had concurred with the House as and in the manner required by the constitution.

Now, was this message a truthful one, or was it wholly false? What court will take the responsibility of saying it was false? If true, then, although the Senate journal fails to state it, there is entire conformity to the constitutional requirements.

The burden of proof is on the objector. Suppose he has, by the production of the Senate journal, changed that burden and thrown it upon us, do we not throw it back upon him again by this solemn act of the Senate? The two houses work together. The journal of the House is evidence, and legitimate evidence, on this issue. There is recorded in the House journal a solemn and official act of the Senate which it was the *duty* of the House to record. Now, we submit, with entire confidence, that the objector has not made out his case upon the issue which he presents us, by the testimony upon which he relies. Certainly his case is not made out by the journals, taken as a whole, unless it should be held that the Senate journal is the sole, exclusive, and unimpeachable evidence of what the Senate did, and that the official message of the Senate to the House, recorded in the House journal, is not legitimate evidence on this issue. We submit, that in the absence of all constitutional or statute direction, giving to the Senate journal this controlling effect, no court will do it.

V.

It may not be wholly uninstructive to consider the condition in which a non-resident of Illinois, and indeed a resi-

dent for that matter, is placed by the rule held by the Supreme Court of Illinois.

A resident of Iowa desires to purchase some bonds issued by the plaintiff in error. The authority to issue these bonds, if any exists, must be found in a statute of Illinois. He looks into the Statute law of that State, published by authority of law, and finds the act of 18th of February, 1857, under and by virtue of which the bonds purport to have been voted and issued. He examines this statute and finds that it gives ample authority for that purpose. Here he meets his *first* difficulty. He is told that he cannot act with safety on the authority given by this act as *published*, although the book contains the certificate of the Secretary of State that the act, as published, is a true copy of the enrolled law. He must go further and examine the enrolled law itself, to ascertain certainly what the law is. He then goes to the office of the Secretary of State, examines the enrolled law, on file there, finds it precisely like the published law; finds that it has all the ear-marks of having been duly and constitutionally passed by both houses of the Legislature; finds that it bears the signatures of the speakers of both houses, was approved by the Governor, and duly deposited with the Secretary of State as a *law* of that State. He thinks he should have the right to rest here, as having found the *ultimate* proof of what the law is.

Here he meets his *second* difficulty. He is told that this is after all but *prima facie* evidence of what the law is; that it is competent to overcome this evidence by the journals of the Legislature, if upon examination it should not appear from them that all the constitutional requirements were observed in the passage of the act, and that to make the fact of the existence of the law *certain*, he must examine the journals of the Legislature for the year 1857.

He then asks for these journals, and is shown the *printed* journals of the Legislature for that year, two large books, one of the Senate and one of the House. The bill for the

act having originated in the House, he reads the House journal through first, and finds the evidence complete there. He then takes the Senate journal, and upon careful perusal of that, he does not find full evidence that every thing was done that the Constitution required. He then looks into the decisions of the Supreme Court of that State for light on this tedious investigation, and there finds in *I. C. R. R.* vs. *Wren*, 43 Ill., 77, that the Court says:

"We are not aware of any law which makes the *printed* journal evidence of the contents of the *original*."

So he finds that the *printed* journals cannot be relied on as evidence to prove the fact he is trying to ascertain, and this constitutes his *third* difficulty.

He then finds that the statute provides that the original journals shall be copied by the "lowest bidder" into a well-bound book, to be provided for that purpose by the Secretary of State. He goes to the office of the Secretary, finds such a book there, but he finds no certificate appended thereto, either of the Secretary of the Senate, of the Secretary of State, of the person who made the successful bid for the job of copying the journals into this book, or of any other person, whether official or non-official, that this book has ever been compared with, or that it is a true copy of, the original journals; and he concludes that if what purports to be copies of the journals as published by the official printer are not evidence, surely, for the same and even for stronger reasons, this book cannot be evidence. Here is his *fourth* difficulty.

Where shall he next go? Obviously to the original journals, as made by the secretaries of the Senate and House, as these are the only written evidence left for him to examine. In this case he would be told that they were not preserved until after the act of 1869 made it obligatory on the Secretary of State to preserve them. Here is his *fifth* difficulty.

But suppose they had been preserved, were accessible to

him, and upon inspection the Senate journal did not show that in the passage of the bill for this act every constitutional requirement was observed? What then? Does that settle the question of fact? Not at all, for these journals are not the *sole* evidence of what the Senate did. The Secretary and his assistant, and each Senator, are competent witnesses to prove any *fact* connected with the passage of that bill. How can this issue be settled? Clearly only upon a trial of the issue by some court of competent jurisdiction. There is no *ultimate* proof to be found—nothing on which the mind can rest. This patient and laborious gentleman from Iowa must go home with the conviction that it is impossible to determine, under the rule held by the Supreme Court of Illinois, what the statute law of that State is, and that therefore no one can act with safety when his acts or his rights depend for their validity on the statute law of that State.

The question then arises, and is in fact the most important question in this case, is a non-resident of Illinois, as against a citizen or municipality of Illinois, in order to ascertain conclusively what the statute law of that State is, required to make all this laborious and unsatisfactory investigation, or may he rely conclusively for the evidence of what such law is upon the statutes as promulgated to the world by and under the authority of the State, or upon the enrolled acts of the Legislature as he shall find them deposited with the Secretary of State? It is clear that if an enrolled law, duly signed by the Speakers of both houses of the Legislature, approved by the Governor, and deposited with the Secretary of State, is not the ultimate evidence of what the statute law of a State is, then practical non-intercourse between citizens of different States, in all matters which are based upon the statute law of a State, must follow.

VI.

WE SUBMIT THAT AN ENROLLED LAW, DULY SIGNED BY THE

SPEAKERS OF BOTH HOUSES OF THE LEGISLATURE OF A STATE, APPROVED BY THE GOVERNOR, AND DEPOSITED WITH THE SECRETARY OF STATE, IS, AS TO NON-RESIDENTS OF THAT STATE, THE ULTIMATE EVIDENCE AS TO WHAT THAT LAW IS.

This proposition is sustained by very high authority, as is shown by the following cases:

Hunt vs. *Van Alstyne*, 25 Wend., 606.
People vs. *Devlin*, 33 N. Y., 279.
Pangborn vs. *Young*, 32 N. J., 30.
Duncombe vs. *Prindle*, 12 Iowa, 11.
Fouke vs. *Fleming*, 13 Md., 413.
Pacific R. R. vs. *The Governor*, 23 Mo., 362.
Evans vs. *Browne*, 30 Ind., 519.
Brodnax vs. *Groom*, 64 N. C., 247.
Louisiana St. Lottery Co. vs. *Richoux*, 23 La. An., 743.
Eld vs. *Gorham*, 20 Conn., 16.

In *Hunt* vs. *Van Alstyne*:

Chief Justice Nelson is of the opinion that an exemplfied copy of an act of the Legislature required by the constitution to be passed by a vote of *two-thirds* of the members of the Legislature to render it valid, will be deemed to have been thus passed, if so certified by the presiding officer of each House; and that the certificates of the officers cannot be controverted, either by the production of the journals of the two Houses, or by parol testimony.

In *Fouke* vs. *Fleming*, the court held, that where the engrossed bill and published copy of same correspond, the court would not assume them erroneous, and decide the law to be according to the evidence of the proceedings in the Legislature as furnished by the journals of the two Houses. An engrossed bill is examined by a committee of the House in which it originated; then the bill, *as* engrossed, is assented to by both Houses; then attested by the Chief Clerk of each House, and signed by the Governor, with the seal of the State annexed. All this would seem to be better evidence of what the law is than the journals of the two

branches of the Legislature. Each journal being kept and attested only by the Chief Clerk of his particular branch.

In *Duncombe* vs. *Prindle*, the court say, the enrolled bill, filed and preserved in the Secretary's office, is the authenticated copy of the real bill which the General Assembly passed, and is the *ultimate* proof of the true expression of the Legislative will. And that, for this obvious reason, that it is *the* bill which received the signatures of the officers of both branches of the Legislature, after a committee, appointed for that purpose, had compared it with the law as passed, and reported it as a true copy of the same. *Behind* this it is impossible for any court to go for the purpose of ascertaining what the law is.

In *Pangborn* vs. *Young*, the opinion was delivered by *Ch. J. Beasley*, who said, it is objected that the act of the Legislature (referred to) was not enacted in conformity to the requirements of the constitution of this State, and on that account is illegal and altogether void.

The important question is, whether the court was authorized to go behind the copy of a legislative act on file in the office of the Secretary of State, and which is authenticated with the usual solemnities.

The Court regards this investigation as relating entirely to the law of *evidence*, and discusses first, the character, as evidence, of an enrolled bill, as authenticated and filed in the office of the Secretary of State, and then the character, as evidence, of the journals of the two Houses of the Legislature, the discussion of the latter being very full, exhaustive, and showing very conclusively the utterly unreliable character of these journals *as evidence*.

The Court then asks, "Can the Court resort to this source of information to satisfy itself on the point whether a legislative act has been thus constitutionally passed?"

The answer is thus given:

"The Legislature has, with care and a wise precaution, adopted a mode of certifying its own acts in an authentic form, and indeed, so completely has this purpose been

effected, that it appears hardly practicable to suggest additional safeguards. To the correctness of the bill we have the signature of the presiding officer of each House, and of the Governor. It was then immediately made public by being filed in the office of the Secretary of State.

"These are the *sanctions* which the Legislature has provided for the authentication of its own acts, both *to the public*, and to the judicial tribunals; and the question is therefore presented, whether such authentication must be deemed *conclusive*, or, in other words, whether the Legislature does not possess the *right of declaring* what shall be the supreme evidence of the authenticity of its own statutes.

"This question, in my opinion, must be answered in the *affirmative*.

"This rule accords with public policy. Few things would be more mischievious than the introduction of the opposite rule.

"If an appeal is to be allowed from an enrolled law to the legislative journals, how is the inquiry to stop at that point? In law, upon ordinary rules, it is plain that a journal is *not a record*, and is therefore open to be either explained or contradicted by parol proof. It is evident, upon the plainest ground, that the Court could not enter upon such an investigation. The Court cannot try issues of fact; nor, with any propriety, could the existence of statutes be made dependent on the results of such investigations. The notion that courts could listen upon this subject to parol proof is totally inadmissible, and it therefore unavoidably results, that if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed, nor its errors corrected.

"One among the many practicable difficulties which suggest themselves, is, what is to be the extent of the application of such a doctrine? If an enrolled statute of this State does not carry with itself the *conclusive evidence* of its own authenticity, it would seem that the *same principle must be extended to the statutes, however authenticated, of other States*. An act, therefore, of Virginia or California, with regard to the *mode of its enactment* would be open to trial as a matter *in pais*. And indeed the doctrine, if carried to its legitimate conclusion, would seem to abolish altogether the conclusiveness even of international authentication; for if the great seal of this State, attesting the existence of a statute, is not final, it is

not perceived how a greater efficacy is to be given to the seal of a foreign government.

"In the frame of our State government, the Legislature, the executive, and the judiciary are co-ordinate, and in all things equal and independent; each, within its sphere, is the trusted agent of the public. It must be borne in mind that the point now touched does not relate *to the capacity to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality.* This is clearly a function of the judiciary. But the proposition is, whether, when the Legislature has certified to a *mere matter of fact relating to its own conduct, and within its own cognizance*, the courts of the State are at liberty to inquire into or dispute the veracity of that certificate? I can discover nothing in the provisions of the constitution, or in the general principles of the Government, which will justify the assumption of such superior authority. In my opinion, the power to certify to the public the law itself has enacted, is one of the trusts of the constitution to the Legislature of the State.

"My general conclusion then is, that both upon the grounds of public policy and upon the ancient and well-settled rules of law, the copy of a bill attested in the manner above mentioned, and filed in the office of the Secretary of State, is the conclusive proof of the enactment, and contents, of a statute of this State; and that such attested copy cannot be contradicted by the legislative journals or in any other mode."

Independent of the high character of the court which rendered this decision, the weight of the decision lies quite as much in the able, exhaustive, and conclusive reasoning of the learned judge who delivered the Opinion. The above is but an imperfect abstract of the reasons given for the conclusions arrived at. The whole Opinion is instructive, and a careful perusal of it by this Court is most respectfully urged. The separate and concurring Opinion of Justice Elmer is also instructive, as giving additional reasons for the rule adopted, and for its criticism of the cases which hold the opposite doctrine.

In *Pacific Railroad* vs. *The Governor:*

"The Court say, while the power of the courts to declare

a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such a power is claimed and exercised in relation to laws which *on their face* show that the constitutional limits have been transcended. The reason of this principle limits the claim of jurisdiction to such cases.

"But the question whether a law *on its face* violates the Constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case, the question of validity of a law is determined from the language of it. In the other, the law is not in its terms contrary to the constitution; it is regular on its face; but resort is sought to something behind the law itself in order to ascertain whether in its passage some constitutional requirement was omitted. This would be an inquisition into the conduct of the members of the Assembly—a very delicate power, the frequent exercise of which would lead to endless confusion in the administration of the law; and statutes, constitutional on their face, regular in their terms, *which may have been the rules of action for years, and under which large amounts of property have been vested and numerous titles taken*, may be abrogated and declared void. *A principle, with such a consequence, should be supported by a weight of authority which no court can resist.*

"When we reflect on the manner in which the journals are made up, and the rank of the officers to which that duty is intrusted, how startling must the proposition be that all our statute laws depend for their validity on the journals of the two houses of the General Assembly, showing that all the forms required by the constitution to be observed in their enactment have been complied with. The required forms may be observed, and the clerks may fail to make the necessary or correct entry. In England the statute roll is the *only* and *exclusive* evidence of what the statute law is. If the journals were in every way full and perfect, they have no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried only by itself. It imports absolute verity. This is the common law, and was in full force when our constitution was adopted."

This case is also most elaborately and exhaustively discussed by the Court, and the opinion is full of sound reasoning and apt illustration, and is very instructive.

In *Evans* vs. *Browne*, the court holds, upon the direct question, after full consideration of the character, nature, and effect of legislative journals, that the authentication of the presiding officers of the Legislature is conclusive evidence of the proper enactment of a law, and that evidence cannot be sought elsewhere to falsify it; and refers to cases herein cited and to other cases, as authority on this exact question.

In *The People* vs. *Devlin*, the Court holds that the legislative journals are not legitimate evidence to impeach the statute produced. They are not made evidence by the constitution; they are not made so by the statute; they were never made so at common law. No authority can be found within the limits of my research to admit them to be legitimate evidence to impeach the force and effect of a solemn statute duly certified, but much authority may be found to the contrary.

A long list of authorities is then cited and discussed, sustaining the conclusion of the Court, and this Court is respectfully requested to notice the discussion of the Court in that case *upon the authorities there cited.*

In *Brodnax* vs. *Groom* the court say the due certification of an act of the Legislature makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. The acts of the Legislature, like judgments of courts, are matters of record, and their verity cannot be averred against in a collateral proceeding. This is in opposition to all the authorities.

In *The Louisiana State Lottery Company* vs. *Richoux*, the Court say: "Where a legislative act is duly promulgated according to the constitution and laws under which it is passed, we find no authority in the *judiciary* department to look behind it and determine its validity or invalidity from the proceedings of the General Assembly in adopting it. Such a course, it would seem, is not sustainable on the theory of the independent and separate action of the three branches of the State government. When a legislative act is attacked on the ground that it contains provisions that are unconstitutional, the question of its validity is properly within the scope of judicial action. * * The question

should be, is the law itself constitutional as to its provisions and what it declares, *and not whether it is constitutional as to the manner of its enactment, or the proceedings by which it was enacted.* Courts will *presume* that the constitutional rules laid down for the passage of laws have been complied with by the law maker, and when duly promulgated will accept them *without inquiry* as to the observance or non-observance of required rules and forms in the preparation and passage of bills. The opposite doctrine, we apprehend, would lead to a very confused and perplexing state of affairs in the administration of laws."

VII.

The question of the effect of the amendatory laws of 1869 upon the act of 1857, has been so fully and so ably argued by Judge Eldredge, in the brief filed by him, that we shall not consider that subject beyond a comment or two upon the briefs filed for the plaintiff.

It is claimed that since the recitals in the bonds do not refer to the statutes of 1869, or to either of them, the town did not act under the authority of those statutes, and they cannot be invoked in aid of the acts of the town. We submit that this ground is not tenable. If, at the time the bonds were issued, the statutes of 1869 did *in fact* have any operation or effect upon the statute of 1857, and upon the power to issue the bonds under the vote taken in 1866, it cannot be held that the supervisor and town clerk, mere ministerial agents of the town to perfect the act of the town as declared by its vote, could, by any recitals that *they* should make in the bonds, limit the power of the town to anything less than the *whole* power that existed.

Again, it is claimed by said briefs that the acts of 1869 cannot have a *retrospective* effect. A long list of authorities is cited by Judge Dickey, in his brief, in support of this proposition. We have examined the cases, and find that in every one of them the question was as to the power of the Legislature to give a retroactive operation to a statute where

by so doing it would interfere with *vested rights*. This, the authorities say, cannot be done. We do not controvert this proposition. But many acts of legislatures are held to have retroactive operation where they do *not* interfere with vested rights, and are but *in aid* of some act attempted to be done. That is the precise and only operation of the acts of 1869 upon the act of 1857, and the vote of the town thereunder in 1866. If these acts were necessary, which we do not admit, to give validity to the act of 1857 and the vote taken thereunder, they were corroborative, and not destructive, of them; and so the principle established by these authorities does not apply.

It may be claimed on behalf of the plaintiff in error that the demurrer to the special plea admits that the act of 1857 was not constitutionally passed. We do not consider this to be the true effect of the pleadings; and if it were, in the general view we take of the case, it would be immaterial.

But we have followed the lead of the learned counsel for the plaintiff in error, and discussed the case upon the *merits*, and not upon any technicalities as to what limited issue is made by the demurrer to the special pleas. The record and admitted facts show enough to indicate what are the true merits of the case. Very large interests are involved in the decision of these cases, the realization of which is awaiting the decision of the main question by this Court, and it would be unfortunate for all the parties to have the cases turn upon a mere technicality which should send them back for further trial on the facts. It is most desirable that the main question as to the *authority* to vote and issue the bonds under one or all the statutes referred to be finally settled at this hearing.

Conclusion.

The learned counsel for the plaintiff in error is quite naturally impressed with the fear that this Court will regard the defence set up by his clients as *inequitable*. It is not surpris-

ing that he should have this fear, for he, himself, has too keen a sense of justice and of common right not to be so impressed. He can scarcely mean to say, as his brief would imply, that the taxpayers of these municipal corporations, if compelled to pay these bonds, will be charged against their will, and without any agency on their part, since the record shows that at an election, duly held, the vote in favor of subscription prevailed. If it is true, as he claims, that there was no valid election, and that the same was carried by fraud, it is also true that the taxpayers stood by for over three years after the election, and did nothing to prevent the issuing of the bonds. If they *were* so cheated and defrauded, was it good faith in them to wait this length of time, and until after the bonds were issued, and sold to *bona fide* purchasers, and they had received the full benefit of the money paid therefor, before they set up this claim? Is it not just a little too late?

The main defense set up in these cases strikes the mind at once as most inequitable and unjust. If it prevails, an outrage, shocking to all sense of right and justice, will be committed. No court could tolerate it, unless it felt bound to do so by technicalities of law which it could not evade.

Here is a statute, bearing the signatures of the speakers of both Houses of the Legislature, the highest certificate known to the law that the act had been duly passed by both branches of the Legislature, and the approval of the Governor. It was duly deposited with the Secretary of State as an enrolled law. It was duly published under authority of law, and promulgated by the State of Illinois as a valid law of that State, upon the faith of which all the world might act with safety. The people of that State treated it as a valid law for over fifteen years, and no question was raised against it until made in the case of *Ryan* vs. *Lynch*, in 1873. Transactions of very large amounts are based upon it, and obligations to the amount of many hundred thousand dollars, which derive their vitality from